83-596 NO. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

v.

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Cross Respondents.

On Cross Petition for a Writ of Certiorari to the Supreme Court of New Jersey

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Questions Presented

1. Can two states enter into an agreement to coordinate their laws relating to the taxation of individuals who work in one of the states and reside in the other without securing congressional approval pursuant to the Compact Clause of the United States Constitution (Art. I, §10, Cl. 3)?

2. Is the objective of the Privileges and Immunities Clause of Article IV of the United States Constitution of maintaining harmonious interstate relations satisfied by the 1962 agreement between the States of New York and New Jersey which establishes a system for coordinating the tax laws of the two states by which tax revenues from individuals who reside in one state and earn their income in the other are equitably apportioned and the imposition of double taxation avoided?

3. When viewed as part of New Jersey's entire taxing scheme and the benefits received by New York commuters, does the New Jersey emergency transportation tax, consistently with the Privileges and Immunities Clause of Article IV of the United States Constitution, fairly apportion to New York commuters the costs incurred by New Jersey in the construction, maintenance and operation of interstate transportation facilities servicing that group?

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The cross petitioner, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey, respectfully prays that a writ of certiorari issue to review the opinions and orders of the Supreme Court of New Jersey entered on June 8, 1983 and March 26, 1980.

Opinions Below

The opinion of the Supreme Court of New Jersey has been officially reported at 93 N.J. 447, —— A.2d —— (1983), and also is reproduced in Appendix A to the cross respondents' petition for certiorari in this matter (*Salorio* v. *Glaser,* United States Supreme Court Docket No. 83-353). The opinion of the Superior Court of New Jersey, Chancery Division, which is not officially reported, has been reproduced in Appendix B to the petition for certiorari.

The 1980 opinion of the Supreme Court of New Jersey is officially reported at 82 N.J. 482, 414 A.2d 943 (1980), and has been reproduced in Appendix A to this cross-petition for certiorari. The prior opinion of the Superior Court of New Jersey, Chancery Division, which is not officially reported, has been reproduced in Appendix B to this cross-petition for certiorari.

Jurisdiction

The judgment of the Supreme Court of New Jersey which is the subject of this cross petition was entered on June 8, 1983. It followed a remand ensuing from an earlier opinion of the court dated March 26, 1980. The petition for certiorari was received on September 6, 1983, and this cross petition is filed within 30 days of that date, pursuant to Rule 19.5, Rules of the Supreme Court of the United States.

The cross petition invokes the jurisdiction of the Court pursuant to 28 U.S.C. §1257(3). In arguing that the tax is consistent with the Privileges and Immunities Clause

of Article IV, because it is imposed and collected pursuant to an agreement between the States of New York and New Jersey (Points II and III) and in arguing that other taxes which New Jersey residents pay should be taken into account in determining the validity of the ETT (Point IV), the cross petitioner is petitioning from the earlier opinion of the Supreme Court of New Jersey. The earlier opinion of the New Jersey court was a final decision on these issues, but did not terminate the litigation. The cross petitioner, in its initial cross petition for a writ of certiorari to this Court from the earlier decision of the Supreme Court of New Jersey (Supreme Court Docket No. 80-123), raised the issue of the agreement between the States of New York and New Jersey. The Court's denial of the cross petition in the earlier proceeding (449 U.S. 874 (1980)) does not imply a rejection of the State's position on the merits. *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363, 365 n. (1973), reh. den. 410 U.S. 975; *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 919 (1950).

Statutory and Constitutional Provisions Involved

New Jersey Emergency Transportation Tax Act, N.J. S.A. 54:8A-1 to 57.

Reported in Appendix D to the cross respondents' petition for certiorari.

United States Constitution, Art. IV, §2, cl. 1

> The Citizens of each State shall be entiled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Art. I, §10, cl. 3.

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .

Statement of the Case

The New Jersey tax structure relies very heavily upon property taxes, which are among the highest in the nation (Pa 33).* Since real property taxes for the most part are paid only by residents, nonresidents who commute to New Jersey traditionally have not contributed materially to State revenues even though they derive substantial benefits from the New Jersey transportation system and from other State services. One of the public services which has placed heavy stress upon the fiscal resources of the State has been the transportation of interstate commuters. *See, e.g., In re Central R.R.*, 485 F.2d 208 (3rd Cir. 1973) (en banc) *cert.* den. *sub nom. Timpany* v. *New Jersey*, 414 U.S. 1131 (1974).

In 1961, following extensive studies and hearings on the transportation problem in the North Jersey-New York metropolitan area, (see Appendix A at 9 to 10), New Jersey enacted the Emergency Transportation Tax Act. N.J.S.A. 54:8A-1 et seq. The ETT is an income tax on individuals who use interstate transportation facilities. The imposition of the tax is expressly contingent upon an annual certification by the New Jersey Commissioner of Transportation to the State Treasurer of the existence of a "critical transportation problem" between New Jersey and a bordering state. N.J.S.A. 54:8A-5(c). The extent of the transportation problem existing in the New York-New Jersey metropolitan area was fully documented by the cross petitioner's experts in the second trial court proceeding. Over seven million people travel from home to work every weekday in this area, 2,250,000 of these in northern New Jersey (Pa 273). The transportation problem is aggravated by the extraordinarily high density of the points

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* The reference is to the cross respondents' appendix in the Supreme Court of New Jersey.

of origin and destination and by the limited number of river crossings between the two States (Da 2 to Da 10* and see App. B to cross respondents' petition for certiorari at 32-3). ETT revenues are used exclusively to finance projects designed to alleviate the transportation problems in this area. N.J.S.A. 54:8A-20(b)(2) and see App. A at 15. When enacted, the ETT in effect applied only to New Jersey residents commuting to work in New York. App. A at 12. While the ETT was imposed upon individuals residing in either New York or New Jersey and deriving income in the other state (N.J.S.A. 54:8A-2), the Act allowed a credit to nonresidents for taxes paid to another jurisdiction if the jurisdiction allowed a similar credit to New Jersey residents. N.J.S.A. 54:8A-16(A). The New York personal income tax, which was imposed at the same rate as the ETT, provided for a similar nonresident credit (1960 N.Y. Sess. Laws, Ch. 563, New York Tax Law §640 (McKinney) (repealed)) so that New Jersey residents commuting to New York were allowed a credit against their New York tax liability for the ETT.

Apparently dissatisfied with the loss of revenue resulting from the nonresident credit contained in its personal income tax law, New York repealed the nonresident credit provision and amended the credit allowed to New York residents. 1962 N.Y. Sess. Laws, Ch. 2, approved January 15, 1962. Since allowance of the nonresident credit in the ETT is contingent upon reciprocal treatment of New Jersey residents, the repeal of the New York nonresident credit had the effect of subjecting New York residents to the ETT. The net result was to render New Jersey residents liable for both the New York personal income tax and the ETT on their income derived from New York and

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* The reference is to the cross petitioner's appendix in the Supreme Court of New Jersey.

to render New York residents liable for only the ETT on their income derived from New Jersey.

Discussions between New Jersey and New York to resolve the tax controversy eventually culminiated in an agreement or accord between the two States Appendix C. The heart of the Accord was that by means of reciprocal legislation, each State would tax residents of the other while granting their own residents a credit for taxes paid to the other State. Appendix C at 61, 62, 66-67.

The terms of the Accord between the States were announced by Governors Rockefeller and Hughes on May 6, 1962 in the following Executive Statement:

> Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective States as they affect residents of the other State.
>
> Governor Rockefeller announced that New York, under legislation enacted at the 1962 legislative session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.
>
> Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New Jersey Emergency Transportation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

> In addition, it was agreed that neither State would contest nor participate in contesting the right of the other to levy and collect taxes imposed by the two laws on residents of the other; and that each State would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.
>
> The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.
>
> The Governors stated that they are taking this action in the interest of promoting interstate cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will [App. C at 66 to 67].

Following this executive action, the New Jersey Legislature enacted Chapter 70 of the Laws of 1962, which was made expressly retroactive to all taxable years beginning on or after January 1, 1961. This provision affords a credit to New Jersey residents against the ETT for any income tax imposed by another "critical area State" (*i.e.*, New York). N.J.S.A. 54:8A-16(B). Thus, due to the retroactive

amendment of the New York Personal Income Tax Law repealing the nonresident credit and the subsequent amendment of the ETT granting a credit to New Jersey residents for taxes paid to New York, the ETT is now paid by New York residents working in New Jersey.

The reciprocal crediting provisions in the ETT Act and the New York Personal Income Tax Law remain in effect today. Neither State has taken action to rescind the 1962 Accord. New York, however, despite its undertaking in the Accord not to contest or participate in contesting New Jersey's right to levy the ETT, in 1977 sought leave to file a complaint in this Court against New Jersey alleging that the ETT violated the Privileges and Immunities Clause. Citing *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976), the Court denied New York's motion.* *New York* v. *New Jersey*, 429 U.S. 810 (1976). The Court, however did not reach the effect of the 1962 Accord.

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* In *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976), the Court had held in a brief *per curiam* opinion that Pennsylvania could not maintain an original action against New Jersey to contest the validity of the transportation benefits tax (N.J.S.A. 54:8A-58 *et seq.*), a tax similar in material respects to the ETT, which New Jersey imposed upon Pennsylvania residents commuting to New Jersey. Any harm to Pennsylvania's fisc could be remedied by the elimination of the credit which Pennsylvania granted to its residents for payments of the transportation benefits tax, and the suit was not maintainable by Pennsylvania as *parens patriae* because Pennsylvania was asserting a collectivity of private suits and no sovereign state interest was implicated.

Shortly after the enactment of the New Jersey gross income tax (N.J.S.A. 54A:1-1 *et seq.*), New Jersey and Pennsylvania entered into a reciprocal personal income tax agreement. Under the agreement, each State taxes its own residents who are employed in the other but does not tax residents of the other State employed within the taxing State. The agreement is currently in force and is not, so far as the State of New Jersey is aware, being challenged in any court.

Following New York's unsuccessful attempt—in violation of the Accord—to challenge the ETT by an original action against New Jersey, three individual New York commuters commenced this lawsuit in 1977 in the Superior Court of New Jersey. They sought a declaration that the ETT was unconstitutional, a final injunction against further withholding, a declaration that they need not file further ETT returns or pay further ETT, and a refund of "all monies withheld or paid under the Commuter Tax to date" (Pa 2).

Following certain procedural motions, cross motions for summary judgment and extensive depositions, on October 24, 1978, the trial court issued a comprehensive opinion upholding the constitutionality of the ETT. Appendix B at 53 to 56. The court found that there was indeed a transportation crisis in northern New Jersey, that the "impact of the tax upon residents and non-residents bears a close relation to the challenge of correcting the traffic and commuting problems" (Appendix B at 54), and concluded that the ETT did not violate the Privileges and Immunities Clause or the Equal Protection Clause of the United States Constitution. The court also found that New York and New Jersey had entered into a reciprocal agreement, consistent with the principles of interstate comity embodied in the Privileges and Immunities Clause of Article IV, pursuant to which the ETT and its companion legislation in New York had been enacted and remained in effect. In finding the existence of such a mutual undertaking between the States the trial court stated:

> In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters. New York accepted

> the 1961 legislation and what developed later. It arranged for certain credits to be given residents of both New York and New Jersey. New York saw to it that its residents did not pay anything extra by virtue of their working in New Jersey. New Jersey took the same attitude.
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> • • •
>
> . . . [T]here is no question in this Court's mind that the 1962 accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states . . . [App B at 55].

On appeal to the Supreme Court of New Jersey, that court, as an initial matter, ruled that the cross respondents had standing and that New York State was not the real party in interest in the law suit. The court went on to uphold the ETT as consistent with the Equal Protection Clause, but, concluding that the record before it was insufficient to determine whether or not the ETT violated the Privileges and Immunities Clause, remanded the case to the trial court. Responding to the cross-petitioner's argument that New Jersey residents pay substantial other taxes which should be taken into account in determining the constitutionality of the ETT under the Privileges and Immunities Clause, the court prohibited the inclusion of any tax in the comparison "unless its scope is restricted to collections for transportation services, the asserted ground of justification for the ETT" (Appendix A at 25). The Supreme Court of New Jersey further held that the 1962 Accord between the States of New York and New Jersey was not an enforceable agreement. In the court's view, if if the Accord were interpreted to "bind New York's

power over the extension of tax credits to its residents," (Appendix A at 30), New York would be relinquishing a portion of its sovereign power. Under its reading of the rule of *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978), such an agreement would require the consent of Congress.

While the remand order of the New Jersey Supreme Court was clearly not a final judgment from which a party may appeal pursuant to 28 U.S.C. §1257 (*see Marketstreet Railway Company* v. *Railroad Commission of State of California,* 324 U.S. 548, 551 (1945) and *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469, 477 (1975)), cross respondents nevertheless sought review of that order in this Court. Cross petitioner moved to dismiss and simultaneously cross-petitioned for a writ of certiorari on the ground that the portion of the New Jersey Supreme Court's opinion which concluded that the Accord between the States of New York and New Jersey was unenforceable was incorrect under this Court's decision in *United States Steel Corp.* v. *Multistate Tax Commission, supra.* Cross petitioner further urged that the Accord was consistent with the goals of the Privileges and Immunities Clause because it provided for a system of coordinating the tax laws of the two States respecting interstate commuters and avoided double taxation of those commuters. On October 6, 1980, this Court dismissed cross respondents' appeal for want of jurisdiction (449 U.S. 804) and on the same date denied the State's cross petition for certiorari. 449 U.S. 874.

On remand, cross petitioner, with the assistance of experts in the transportation field, developed extensive evidence on the exact nature of the transportation problem, the extent to which New York commuters contribute to

it, the benefits they derive from New Jersey's expenditures for transportation facilities, and net ETT collections over the twenty-year history of the tax. Cross respondents produced experts' opinions themselves, purporting to refute the State's evidence. In May, 1981 the remand hearing mandated by the New Jersey Supreme Court was held before the trial court. After hearing, the trial court concluded that in light of the New York commuters' contribution to the interstate transportation problem, the costs imposed by New York commuters on the State's transportation facilities, and the transportation benefits they received from ETT expenditures, the ETT did not offend the Privileges and Immunities Clause. Indeed, the trial court concluded that $182.9 million of State transportation expenditures were properly allocable to the New York commuters over the twenty-year history of the ETT Appendix B to cross respondents' petition for certiorari at 36. Moreover, the trial court concluded that these substantial expenditures by the State on behalf of New York commuters produced benefits beyond the mathematical dollar value of the expenditures. Those benefits consist in savings in time and user costs attributable primarily to new highway construction and widening, highway resurfacing, operational improvements, safety improvements, maintenance and drainage, and, in the transit area, savings in time and costs.

Cross respondents again moved for direct certification to the Supreme Court of New Jersey, and on June 8, 1983 that court, reversing the trial court, concluded that the ETT violated the Privileges and Immunities Clause because the burden of the ETT on New York residents was not substantially related to the burden which those residents placed upon New Jersey's transportation facilities. Appendix A to cross respondents' petition for certiorari at 14. Of net ETT collections amounting to approxi-

mately $381 million over the history of the tax, approximately $182 million of costs incurred by the State for transportation facilities were, in the court's view, properly allocable to the New York commuters, an amount slightly less than 50% of the total tax. *Ibid.* While the State's expenditures on behalf of New Yorkers were substantial, it was the court's conclusion that the costs incurred were of a sufficient level of disproportion to total collections (a ratio of roughly 2 to 1) so as to offend the Privileges and Immunities Clause. The court's analysis was restricted to a comparison of the ETT assessment against transportation costs caused by New Yorkers. The court in its earlier opinion had refused to include within the analysis other factors, such as the overall tax burden on New Jersey residents as compared to the ETT burden on New York commuters, or the costs of the entirety of governmental services made available to New Yorkers as contrasted with transportation services only. App. A at 25. While granting cross respondents the declaratory relief which they sought, the court, citing *Lemon* v. *Kurtzman* (*Lemon II*), 411 U.S. 192 (1973), granted prospective relief only, denying refunds of ETT and ruling that its decision would take effect with respect to income earned on or after January 1, 1984.*

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*A complete statement regarding the portion of the New Jersey court's opinion dealing with the remedy afforded the cross respondents is contained in the cross petitioner's brief in opposition to the petition for certiorari in this action. However, for present purposes, suffice it to say that the individual New York commuter is not affected one wit by the New Jersey Supreme Court's decision. Because of the credit mechanisms involved, taxes not paid to New Jersey by such taxpayers must be paid to New York State.

While detailing no individualized harm to themselves by reason of the decision of the Supreme Court of New Jersey, cross respondents nevertheless have petitioned this Court for a writ of certiorari to review that portion of the lower court's judgment denying them recovery of ETT paid. As a basis for granting the writ they allege that the principle of *stare decisis* is threatened by the ruling of the New Jersey court.

REASONS FOR GRANTING THE CROSS PETITION

POINT I

If the Court grants the writ of certiorari to consider the claim of the petitioners-cross respondents that the prospective nature of the judgment below undermines the principle of *stare decisis*, it should grant the cross petition in order to be able to review the entire case.

As indicated in the State's brief in opposition to the petition for certiorari, it is the position of the cross petitioner that the judgment of the Supreme Court of New Jersey below does not undermine the principle of *stare decisis* but rather is fully consistent with the principles laid down in *Lemon* v. *Kurtzman, supra,* and the application of federal equitable remedies. Furthermore, cross respondents' abstract concern for the principle of *stare decisis* is not a sufficient ground for invoking this Court's jurisdiction when cross respondents assert no individualized constitutional (or indeed practical) harm. However, in the event the Court determines that the prospective nature of the judgment below is inconsistent with the principles of *Lemon* v. *Kurtzman* and concludes further that cross respondents' concern over the principle of *stare decisis* presents a substantial constitutional question, it is imperative that the

Court consider the entire case rather than solely the issues raised by the petition for certiorari. The petition questions only the appropriateness of the remedy adopted by the Supreme Court of New Jersey, but the appropriateness of the remedy is an issue only if the lower court was correct in invalidating the ETT. Thus, before reaching the question of the relief afforded by the lower court, the Court should determine whether that question is even present in the case by considering the substantive validity of the tax. In order to determine the validity of the tax, the Court must resolve the issues presented in the cross petition, including the enforceability and effect of the 1962 Accord between New York and New Jersey.

It would require no further expenditure of this Court's resources to consider the cross petition in the event the petition is granted. The record and case authority upon which the cross petitioner would rely in urging the validity of the ETT are fully developed in the existing record. The record documents the 1962 Accord establishing that the States of New Jersey and New York entered into an agreement in order to resolve a controversey between them relating to the taxation of interstate commuters and that the Accord results in no economic harm to those commuters. The record further shows that in the context of New Jersey's entire taxing scheme, the ETT is consistent with the Privileges and Immunities Clause because New York commuters do not pay more than their fair share of New Jersey taxes. There is no inequity in the taxes paid by nonresidents under the ETT compared with the overall taxes paid by New Jersey residents; nor is there inequity in terms of a comparison of total services provided (not just transportation services) and the total tax imposed.

In short, it is the position of the State that there is ample credible evidence in the record to support the conclusion that the ETT is consistent with the Privileges and Immunities Clause of Article IV.

POINT II

The decision of the Supreme Court of New Jersey, that the 1962 Agreement between New York and New Jersey is unenforceable against the cross respondents because it did not receive congressional approval pursuant to Article I, §10, Cl. 3 of the United States Constitution, is irreconcilable with the Court's decision in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978).

As an initial point, it is clear, and the trial court in its initial opinion so held, that there was in fact an agreement between the States of New York and New Jersey respecting their mutual taxation of interstate commuters. The trial court stated:

> In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters. . . .
>
> [T]here is no question in this Court's mind that the 1962 accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states [Appendix B at 55].

There is substantial evidence in the record to support these findings of the State trial court. Thus, the joint statement of Governors Hughes and Rockefeller commences:

> Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York have

> announced that the Executive Departments of their respective States have reached *an understanding* in regard to the operation and administration of the income tax laws of the two states.
>
> The Governors declared that *it has been agreed that* [there follows a list of undertakings by the State of New York and the State of New Jersey.] [App. C at 61; emphasis supplied].

In *United States Steel Corp.* v. *Multistate Tax Commission, supra,* the Court squarely held that reciprocal legislation between two or more States providing for the apportionment or allocation of taxes payable by taxpayers with multistate contacts may be validly enacted without the consent of Congress pursuant to the Compact Clause of the United States Constitution (Art. I, §10, cl. 3). The compact which was upheld was remarkably similar in subject matter and purposes to the Accord at issue here. Both agreements seek interstate coordination of tax policy respecting taxpayers with ties to more than one State, in the interests of equity and convenience. Specifically, the four stated purposes of the Multistate Tax Compact are equally applicable to the 1962 Accord: equitable apportionment, uniformity in state tax systems, convenience, and the avoidance of duplicative tax liability. *Id.* at 456.

The Court in *United States Steel Corp.* v. *Multistate Tax Commission* reiterated the established doctrine that the strictures of the Compact Clause apply only to those interstate agreements that transfer state sovereignty "in a way that encroaches upon the supremacy of the United States." *Id.* at 472. The Court found that an agreement by which the States seek to coordinate the operation of their tax laws with respect to taxpayers with multistate contacts does not in any way enroach upon the sovereignty

of the United States and therefore does not require congressional approval. In light of the close similarities in purposes and effect between the compact upheld in *United States Steel Corp.* v. *Multistate Tax Commission, supra*, and the 1962 Accord between New York and New Jersey, the Supreme Court of New Jersey should have recognized in its initial opinion in this case that the 1962 Accord could be fully effective without congressional approval.

The court, however, held that the 1962 Accord was unenforceable without the consent of Congress because, "if the 1962 Accord were interpreted to bind New York's power over the extension of tax credit [sic] to its residents, it would involve an impermissible relinquishment of that state's sovereign power . . ." (App. A at 30). In the court's view this was an impermissible result under the rule of *United States Steel Corp.* v. *Multistate Tax Tax Commission* absent the approval of Congress.

However, in holding that because ". . . no [congressional] approval was given, the Accord cannot be relied on by the State here as an enforceable agreement", the court confused the question whether New York is free to withdraw from the 1962 agreement (which it has never done) with the question whether the agreement is binding upon taxpayers such as the cross respondents so long as it remains in effect. The power of New York to withdraw from the 1962 Accord is not in issue in this case. (As noted, New York has continued to make credits available pursuant to the Accord.)

Rather, the question is whether the agreement is binding upon taxpayers so long as it remains in effect. And on this latter question, the Court in *United States Steel Corp.* v. *Multistate Tax Commission* squarely held that two or more states may enter into an agreement relat-

ing to the apportionment of tax revenues which would be binding upon taxpayers without securing congressional approval. See also, *Bode* v. *Barrett*, 344 U.S. 583, 586 (1953) (Illinois highway use tax exemption for nonresidents does not require congressional approval where the states of the nonresidents reciprocally grant similar tax exemptions to citizens of Illinois). Therefore, the Supreme Court of New Jersey was simply wrong in concluding that the 1962 Accord is unenforceable against the cross respondents because not enacted in conformity with the Compact Clause.

POINT III

The Emergency Transportation Tax is consistent with the principles of federalism which the Privileges and Immunities Clause of Article IV is designed to serve, because it is imposed and collected pursuant to a 1962 Agreement between the States of New York and New Jersey which provides for the coordination of the tax laws of the two states by equitably apportioning tax revenues from individuals who reside in one State and earn their income in the other.*

A reciprocal arrangement between two States to fairly allocate the financial burdens of government between citizens who reside in one State and work in the other, *with-*

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* While the trial court in its initial opinion of October 24, 1978 concluded that the 1962 Accord between the States of New Jersey and New York satisfied the obligations of the Privileges and Immunities Clause (App. B at 55 to 56), the Supreme Court of New Jersey did not reach this issue in its first opinion because it ruled that the 1962 Accord was unenforceable under the Compact

(Footnote continued on following page)

out imposing any additional overall tax burden on an individual simply because he chooses to work outside the State where he resides, is fully consistent with the objectives sought to be achieved by the Privileges and Immunities Clause of Article IV. This provision, ". . . which 'appears in the so-called States' Relations Article, the same Article that embraces the Full Faith and Credit Clause, the Extradition Clause . . . the provisions for the admission of new States, the Territory and Property

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(Footnote continued from preceding page)

Clause. App. A at 30 to 31. However, while the court held in its second opinion that the ETT, standing alone, is inconsistent with the Privileges and Immunities Clause, it strongly implied that had it not in its earlier opinion "questioned the validity of the accord under the Compact Clause" (App. to cross respondents' petition for certiorari at 18), it would have sustained the ETT as based on an agreement granting reciprocally favorable treatment to nonresidents. *Ibid.* Thus, the issue of the effect of the 1962 Accord on the validity of the ETT was passed upon by the court below and should be considered by this Court. In any event, the failure of a court below to explicitly rule on an issue does not raise a question of the Court's jurisdiction. If, as is the case here, the issue is significant and has been fully briefed and argued by the parties, the Court may reach the issue. *See Blonder-Tongue Labs* v. *University Foundation*, 402 U.S. 313, 320 n.6 (1971). Cross petitioner's position is that the Privileges and Immunities Clause is directed to unilateral discrimination by one State against the citizens of another, not to a mutual undertaking by two sovereigns to fairly and equitably apportion taxes as between themselves without disadvantaging citizens of either state. Thus, the Court in *Austin* itself notes:

> Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treatment of nonresidents by States that coordinate their tax laws [420 U.S. at 668, n.12].

Clause, and the Guarantee Clause,' *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371, 379 (1978), 'establishes a norm of comity' *Austin* v. *New Hampshire*, 420 U.S. 656, 660 (1975), that is to prevail among the States with respect to their treatment of each other's residents." *Hicklin* v. *Orbeck*, 437 U.S. 518, 523-524 (1978). The opinion of the Court in *Austin* v. *New Hampshire, supra*, reaffirmed the view that the primary purpose of this Clause was the maintenance of proper relations between sovereign States in a federal union:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism [420 U.S. at 662].

Therefore, while invalidating New Hampshire's unilateral action in imposing a tax on Maine residents—described in *Pennsylvania* v. *New Jersey, supra* at 662, as a "beggar-thy-neighbor tax"—the Court was careful to point out that the Privileges and Immunities Clause would not require the invalidation of a tax on nonresidents which was part of a reciprocal arrangement between the State of domicile and the State of employment:

> Neither Travis nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treat-

> ment of nonresidents by States that coordinate their tax laws [420 U.S. at 667, n. 12].*

Therefore, it is clear that the Privileges and Immunities Clause of Article IV does not preclude sovereign States in the federal system, each acting in the interests of its own citizens, from entering into agreements which establish a fair system for the imposition of taxes upon citizens with multistate contacts.

The trial court found as a fact that the States of New York and New Jersey had entered into a reciprocal arrangement in 1962 regarding the taxation of individuals who reside in one of the States and work in the other. It

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*The cross respondents have argued previously that this quotation does not support the validity of the ETT because the ETT does not accord them "favorable treatment". This argument is fallacious for several reasons. First, it is strongly arguable that the agreement does assure individuals in cross respondents' situation more favorable tax treatment than they otherwise might receive. Since the State of New York may constitutionally subject cross respondents to tax on the full amount of their income wherever earned (*Lawrence* v. *State Tax Commission*, 286 U.S. 276, 280-281 (1932)) and it is not disputed that cross respondents may be taxed pursuant to the New Jersey Gross Income Tax Act to the full extent of their New Jersey income, cross respondents have an exposure to double taxation on their New Jersey income which the agreement between the states serves to avoid. Furthermore, if the avoidance of possible double taxation is not recognized as "favorable treatment", it is still clear that the ETT does not impose any disadvantage upon cross respondents but rather, at worst, simply has a neutral effect upon them, since the amount of taxes which they pay to New Jersey under the ETT is identical to what they otherwise would be required to pay New York. A reciprocal arrangement which has a neutral effect on the overall tax obligations of a nonresident who works in another state is fully consistent with the principle of federalism which the Privileges and Immunities Clause of Article IV was designed to serve.

found that "[t]here was in 1962 and there continued thereafter an arrangement between the States of New York and New Jersey, their governors and their legislators which accepted as valid the tax situation now being challenged" (App. B at 50); ". . . that the 1962 Accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states" (App. B at 55); and that "[n]either governor has taken formal action to rescind the limited part of the accord not dependent on legislative action, nor have they even made a statement which would challenge the validity of the arrangement" (App. B at 56).

There is more than sufficient evidence in the record to support the trial court's findings. When New Jersey first enacted the Emergency Transportation Tax Act in 1961, the incidence of the tax fell exclusively upon New Jersey residents. New York was dissatisfied with the fiscal consequences of the reciprocal crediting provisions of the ETT and the New York personal income tax, so appropriate steps were initiated to reverse the incidence of the taxes of the respective States. The New York Legislature enacted chapter 2 of the Laws of 1962 by which it repealed the tax credit previously afforded nonresidents for taxes paid to their State of residence and at the same time extended a credit to its own residents for taxes paid to the State in which they worked. By chapter 70 of the Laws of 1962, the New Jersey Legislature enacted similar complementary amendments to the ETT. The practical effect of these legislative enactments by the two States was to change the interstate taxing system of New York and New Jersey from one in which each State imposed a tax on its own residents to one in which each State imposed a tax on the residents

of the other State who commuted to work in the taxing State.

This reciprocal action by the legislatures of the two States set the essential framework for the May 6, 1962 agreement between Governors Rockefeller and Hughes. Paragraph 2 of the Agreement is an announcement by Governor Rockefeller ". . . that New York, *under legislation enacted at the 1962 legislative session,* will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Tax Act enacted in 1961, as amended" (App. C at 66) (emphasis added). Similarly, paragraph 3 of the agreement announced the intent of Governor Hughes to submit to the New Jersey Legislature the bill which was enacted less than a month later as chapter 70. Complementary to those basic legislative provisions, the remaining paragraphs of the agreement set forth mutual agreements by the States not to participate in contesting the taxes imposed by the two laws and to assist and cooperate in the administration and enforcement of the two laws. Therefore, the 1962 Accord represented a solemn reciprocal undertaking between the legislative and executive branches of the respective states.

Furthermore, this agreement remains intact today. The New York Legislature has not sought to repeal the tax credit extended to its residents for taxes paid to New Jersey, and the New Jersey Legislature has adhered to New Jersey's essential obligation under the 1962 Accord by continuing in effect the credit afforded its residents for taxes paid to New York. Similarly, neither governor has taken formal action to rescind the limited part of the Accord not dependent on legislative action. Therefore, assuming that either State could unilaterally withdraw from the 1962

Accord, the plain fact is that neither State has attempted to do so.*

The cross respondents seek to circumvent the provisions of the 1962 Accord by arguing that this case involves individual rights which are beyond the power of the States to address by reciprocal executive and legislative action. However, the Privileges and Immunities Clause is found in Article IV of the Constitution dealing with relations among states. "The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948). The legal import of the 1962 Accord is not that a State in concert with another State may limit the constitutional rights of an individual. Rather, the Accord represents a practical solution by the legislatures and executives of New York and New Jersey to the problem of taxing individuals who work in one of the States and reside in the other, without increasing the total tax burden of the cross respondents or of any other commuters similarly situated. Therefore, if the Court grants the petition for certiorari, it also should grant the cross petition in

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* As noted, however, while New York has not attempted to withdraw from the Accord, it has breached it, first by seeking a judgment from this Court that the New Jersey taxing scheme was unconstitutional (*New York* v. *New Jersey*, 429 U.S. 810 (1976)) and then by encouraging and financing this lawsuit (see letter to cross respondent McGarr from New York budget director at Da 1) in violation of its undertaking not to contest nor participate in contesting New Jersey's right to levy the ETT. However, neither the enforceability of this provision in the 1962 Accord nor the appropriate remedies for its breach are issues in this litigation. The only issue here is the effect of this agreement on the individual taxpayer, so long as it remains in effect.

order to consider the effect of the 1962 Accord upon the ETT's conformity with the principles of federalism which the Privileges and Immunities Clause of Article IV was designed to serve.

POINT IV

When viewed as part of New Jersey's entire taxing scheme and in conjunction with the benefits derived by New York commuters, the Emergency Transportation Tax is consistent with the Privileges and Immunities Clause of Article IV because New Jersey residents pay substantial other state taxes which nonresidents do not pay.

In determining the constitutionality of States taxes imposed only upon nonresidents, the Court has made clear that the analysis must take into account the entire taxing scheme of a State. If, when all the taxes are taken into account, the burden on residents and nonresidents is approximately equal, an individual tax imposed only upon nonresidents is not infirm. In *Travelers' Insurance Company* v. *Connecticut,* 185 U.S. 364 (1901), a state property tax based upon the assessed value of shares of stock in domestic corporations was challenged under the Privileges and Immunities Clause on the ground that shares held by nonresidents were assessed at market value while shares held by residents were assessed at market value "less the proportionate value of all real estate held by the corporation on which it [had] already paid a tax." The Court upheld the tax. It found that nonresident shareholders effectively paid no local taxes while resident shareholders paid taxes to the municipalities in which they resided. The Court reasoned:

> It was believed that a resident in a city or town, enjoying all the benefits of local government, should be taxed for the expenses of that government upon all the property he possessed, whether that property consisted in part or in whole of shares of stock. On the other hand, the nonresident, enjoying little or none of the benefits of local government, was exempted from taxation on account of the expenses of such local government. *At the same time it was not right that he should escape all contribution to the support of the state* which created and protected the corporation and the property of all its stockholders, and so a tax was cast upon the nonresident stockholder for the expenses of the state [185 U.S. at 368; emphasis supplied].

See also, General American Tank Car v. *Day,* 270 U.S. 367 (1926) (State property tax on rolling stock owned by nonresident corporations held not violative of Commerce Clause or Equal Protection Clause because, while resident corporations did not pay the tax, residents paid local property taxes). In *Gregg Dyeing Co.* v. *Query,* 286 U.S. 472 (1932), the Court squarely faced the issue of whether a State tax must be nondiscriminatory in and of itself or whether other taxes may be taken into account in determining its constitutionality. The Court concluded that a State tax imposed upon the use or storage of gasoline brought into the State violated neither the Commerce Clause nor the Equal Protection Clause because in-state sales and the in-state use of gasoline by in-state producers were similarly taxed although under different taxing statutes. The Court stated:

> But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the

> Act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirement in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power [286 U.S. at 479-480].

Moreover, there is no requirement that a tax on nonresidents be duplicated by an identical tax on residents. A tax on nonresidents may be completely different in form and rate as long as the overall burden is approximately equal. *Interstate Busses Corp.* v. *Blodgett,* 276 U.S. 245 (1927) (state mileage tax on interstate buses held not violative of Commerce Clause when intrastate carriers paid a gross receipts tax); *Safeway Trails, Inc.* v. *Furman,* 41 N.J. 467, 490-491 (1964) appeal dism'd and *cert.* den. 379 U.S. 14 (1964).

Austin v. *New Hampshire, supra,* is consistent with the principle of taking into account the entire taxing scheme of the State. Reviewing all the New Hampshire taxes, the Court concluded that those paid by nonresidents nowhere near equalled those imposed upon nonresidents under the commuter tax. Thus, *Austin* does not deviate from the principles set forth in the cases just discussed. Rather, the State simply could not meet the test which those cases impose.

In contrast to *Austin,* it is clear in this case and the trial court so held, that residents of New Jersey pay sub-

stantial property taxes. Nonresident commuters do not ordinarily pay such taxes, and yet they benefit from the services and protections afforded by the local governments which are supported by the property tax (App. B at 54). There is ample evidence in the record to support the trial court's findings. In an affidavit filed in conjunction with the State's cross motion for summary judgment in the initial trial court proceeding (Pa 845 to Pa 850), the Director of the New Jersey Division of Taxation stated that during the 1976 fiscal year, the average New Jersey resident paid property taxes amounting to $446.48. The only state in which per capita property taxes were higher during that year was Alaska. The Director of the Division of Taxation further attested that during the 1977 calendar year the average New Jersey resident household paid total New Jersey taxes amounting to $2,605.65, while the average nonresident household paid total New Jersey taxes, including the ETT, amounting to $583.15. In short, when the whole scheme of taxation is taken into account, it is clear that New Jersey residents pay more than their fair share of the costs of government, including the costs of transportation services. The New Jersey Supreme Court did not take the State's entire taxing scheme nor the governmental services provided (in addition to transportation services) into account in analyzing the constitutionality of the ETT under the Privileges and Immunities Clause.

Moreover, even if the ETT were analyzed without consideration of the other taxes borne by New Jersey residents, the tax would still be consistent with the Privileges and Immunities Clause. As established by the State in the remand proceeding, the New Jersey highway system was in place by 1961, the year in which the ETT was enacted (App. B to cross respondents' petition for certiorari at 37). Since that time, State expenditures for highway facilities have been used primarily to widen

and maintain the existing roads in order to accomodate commuter demand (*Ibid.*). Thus, while New York commuters, through the ETT, have contributed to the ongoing support of the New Jersey highway system, they contributed virtually nothing to its initial construction. The capital costs to construct the system were borne by New Jersey residents alone.

The Court has sanctioned similar state imposed cost differentials between residents and nonresidents. In *Vlandis* v. *Kline*, 412 U.S. 441 (1973), the Court struck down on Due Process grounds a State statute which created, under certain facts, an irrebuttable presumption of nonresidency for purposes of determining tuition rates at the state university. However, the Court made clear that the State had a legitimate interest in establishing preferential tuition rates for its residents. 412 U.S. at 448 and 453. That legitimate interest was elaborated upon in the dissenting opinions. In view of the large costs incurred by the States in constructing and operating their state universities and the tax burden imposed on state residents to fund those costs, the States could constitutionally require nonresidents to pay higher tuitions than residents.

The position of the New York commuters in this case is similar. They are benefiting from a highway system constructed in large part through tax dollars paid by New Jersey residents. The ETT merely assesses the New York commuters for a small portion of the State's current transportation costs. Such an assessment, in view of the heavy costs borne by New Jersey residents in putting the highway and transit systems in place, is fully consistent with the Privileges and Immunities Clause.

In short, the New Jersey Supreme Court misinterpreted the holdings of this Court in prohibiting the State from

justifying the ETT on the basis of other taxes paid primarily by residents and the prior contributions made by New Jersey residents to the transportation infrastructure, as well as the transportation costs imposed by New York commuters on the State of New Jersey. Therefore, if the Court grants the petition for certiorari, it should also grant the cross petition.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the cross petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 1983

83-596 NO. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

v.

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Cross Respondents.

On Cross Petition for a Writ of Certiorari to the Supreme Court of New Jersey

APPENDIX TO CROSS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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APPENDIX A

Opinion of the Supreme Court of New Jersey, dated March 26, 1980

SUPREME COURT OF NEW JERSEY

A-60 SEPTEMBER TERM 1979

JOHN SALORIO, ROBERT COE and JOHN D. MCGARR, JR.,

Plaintiffs-Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Defendant-Respondent.

Argued November 14, 1979—Decided March 26, 1980

On certification to the Superior Court, Chancery Division.

Adrian M. Foley, Jr., and *Max Gitter* a member of the New York Bar, argued the cause for the appellants (*Connell, Foley & Geiser*, attorneys; *Max Gitter* and *Mark C. Morril* members of the New York Bar and *Adrian M. Foley, Jr.*, and *Kevin J. Coakley*, of counsel and on the briefs).

Stephen Skillman, Assistant Attorney General argued the cause for the respondent (*John J. Degnan*, At-

torney General of New Jersey, attorney; *Stephen Skillman,* Assistant Attorney General, *Herbert Glickman* and *Joseph C. Small,* Deputy Attorneys General, on the brief).

The opinion of the Court was delivered by
PASHMAN, J.

I

This case presents for review the constitutionality of the Emergency Transportation (ETT) Act, N.J.S.A. 54: 8A-1 *et seq.*

Plaintiffs,[1] three New York residents who commute or have commuted from their homes in New York to work in New Jersey, claim that since the ETT is paid solely by New York residents, it impermissibly discriminates against them in violation of the Privileges and Immunities and Equal Protection Clauses of the Federal Constitution. *U. S. Const.,* Art. IV, §2, cl. 1; Amend XIV, §1. The State argues that imposition of the tax is justified by the existence of a "transportation emergency."

Plaintiffs filed suit in the Superior Court, Chancery Division, on June 8, 1977, seeking declaratory and injunctive relief from imposition of the tax. They also demanded damages in the amount of all monies paid to New Jersey pursuant to the ETT.[2]

The taxpayers and the State filed cross motions for summary judgment. On plaintiffs' motion, the court agreed

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[1] John Salorio, John D. McGarr, Jr., and Robert Coe.

[2] Since the issue was neither briefed nor argued, we do not address the extent of the State's liability, if any, for money damages.

to hear the matter as a summary proceeding without oral testimony pursuant to R. 4:67. Taking issue with plaintiffs' contention that the tax statute was facially unconstitutional under *Austin* v. *New Hampshire,* 420 U.S. 656, 43 L.Ed2d 530 (1975), the State requested an opportunity to develop and introduce evidence that a "transportation emergency" justified the disparate treatment of non-residents. The parties took depositions of the plaintiffs and various State officials. The State also submitted documentary material regarding a 1962 taxation accord between New York and New Jersey (hereinafter the Accord).

In a letter opinion, the trial court declared the tax constitutional. According to the court, the sole issue presented by the plaintiffs under the Privileges and Immunities Clause was "whether or not the *Austin* case is dispositive of [the validity of] the legislation." Finding that a transportation crisis did in fact exist, and comparing the total tax liabilities of New Jersey residents to that imposed by New Jersey on commuters from New York, the court concluded that the criterion of "substantial equality" enunciated in *Austin* was satisfied. See 420 U.S. at 665, 43 L.Ed. 2d at 537. The court further held that even if there were no distinctions between the present case and *Austin* based on the states' justifications for their respective taxes, the 1962 Accord was sufficient to validate New Jersey's taxation scheme.

Addressing plaintiffs' claim under the Equal Protection Clause, the court noted that in economic matters a statute need only bear some rational relation to a legitimate governmental objective. In the area of tax policy, the Legislature enjoys particularly broad discretion. Having found a proper governmental purpose, the court sustained the tax. The court did not determine whether the Act was unconstitutionally applied by reason of misappropriation of ETT

receipts. Noting that the Act itself "contains the internal safeguards" to insure that tax monies would be spent exclusively to alleviate the State's "transportation emergency," the court remanded plaintiffs to the remedies provided by the statutory scheme. It accordingly entered judgment in favor of the State.

Plaintiffs appealed from the judgment of the trial court. While the appeal was pending unheard in the Appellate Division, plaintiffs filed a motion for direct certification pursuant to R. 2:12-2. This Court granted plaintiffs' motion. 81 N.J. 269 (1979). We now vacate the trial court judgment and remand the matter for proceedings consistent with this opinion.

II

Standing

An initial question arises as to plaintiffs' standing to bring this action. The record discloses that each of the plaintiffs either has paid or continues to pay emergency transportation taxes to New Jersey.[3] However, since New York grants its residents a credit for income taxes paid to

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[3] Plaintiff John Salorio filed non-resident returns during the years 1972 through 1976 and paid from $1,493 to $2,467 per year in emergency transportation taxes. Plaintiff Robert Coe currently has emergency transportation withheld from his income. Plaintiff John D. McGarr, Jr. filed non-resident returns for 1975, 1976 and 1977, paying $1,903, $2,734 and $4,096 respectively, in emergency transportation taxes. A portion of emergency transportation taxes paid by Salorio and McGarr on income earned after the effective date of the Gross Income Tax Act, L. 1976, c. 66, N.J.S.A. 54A:1-1 *et seq.*, (effective August 17, 1976) was allocated as receipts under the latter tax. See N.J.S.A. 54:8A-121; *infra* at (slip op. at 18).

other states, any reduction in tax liability to New Jersey will result in an equal increase in tax liability to New York. See *infra* at —— (slip op. at 14-15). Thus plaintiffs would not gain financially from a judgment in their favor. Emphasizing this apparent lack of economic harm and the fact that the State of New York is financing the present litigation, the State argues that plaintiffs do not have sufficient interest in the case and that New York is the "real party in interest."

Despite the fact that plaintiffs' total tax obligation may remain unchanged, we conclude that they have standing to challenge the constitutionality of the ETT. It is important to recognize that New Jersey State courts are not bound by the "case or controversy" requirement governing federal courts, *U.S. Const.*, Art. III, §2. See *Crescent Park Tenants Ass'n* v. *Realty Eq. Corp. of N.Y.*, 58 N.J. 98, 107-108 (1971). Our State Constitution contains no analogous provision limiting the subject-matter jurisdiction of the Superior Court. See *N.J. Const.* (1947), Art. VI, §3, par. 2. This Court remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration. We therefore find it unnecessary to consider whether federal standing requirements have been met.[4]

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[4] We also recognize that on review, the United States Supreme Court "'must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court..'" *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 525, 3 L.Ed.2d 480, 483-484 (1959) (quoting *First Nat'l Bank* v. *Anderson*, 269 U.S. 341, 346 (1926) and *Staub* v. *Baxley*, 355 U.S. 313, 318 (1958)).

We have consistently held that in cases of great public interest, any "slight additional private interest" will be sufficient to afford standing. *New Jersey State Chamber of Commerce* v. *New Jersey Election Law Enforcement Comm'n*, —— N.J. —— (1980) (slip op. at 16-17); *Home Builders League of South Jersey, Inc.* v. *Tp. of Berlin*, 81 N.J. 127, 132 (1979); *Terwilliger* v. *Graceland Memorial Park Ass'n*, 35 N.J. 259, 268 (1961), aff'g 59 N.J. Super. 205, 215 (C. Div. 1960); *Elizabeth Federal Savings & Loan Ass'n* v. *Howell*, 24 N.J. 488, 499 (1957); *Al Walker Inc.* v. *Bor. of Stanhope*, 23 N.J. 657, 660-666 (1957); *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 N.J. 433, 476 (1952), *cert. den.*, 344 U.S. 838, 97 L.Ed. 652 (1952); *cf. Hudson-Bergen County Retail Liquor Stores Ass'n* v. *Bd. of Comm'rs of Hoboken*, 135 N.J.L. 502 (E & A 1947). A sufficient private interest exists in this case. If successful, plaintiffs would enjoy the benefit derived from the use of any funds recovered from the State of New Jersey prior to the time such monies may have to be remitted to New York. As New York residents, they would also share in the possible beneficial effect that a resulting increase in tax revenue to New York might have on future New York tax rates.[5]

As the trial court noted, the United States Supreme Court has rejected the State's theory that New York and not the plaintiffs is the "real party in interest." In *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 49 L.Ed.2d 124 (1976), Pennsylvania alleged that this State's Transporta-

[5] These interests were advanced by plaintiff Robert Coe at his deposition and not challenged by the State. Coe also claimed that he would "not have to file so many forms," but on cross-examination by the State admitted that he would still be required to file a New Jersey gross income tax return.

tion Benefits Tax, N.J.S.A. 54:8A-58 *et seq.*,[6] was unconstitutional under the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment.[7] Finding no justiciable controversy, the United States Supreme Court denied Pennsylvania's motion for leave to file an original complaint. The Court held that the only direct injury to the plaintiff states resulted from decisions by their legislatures to extend tax credit for income taxes paid by their residents to the defendant states. Without resolving Pennsylvania's claims

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[6] The Transportation Benefits Tax operated in a manner similar to the ETT, covering only Pennsylvania residents deriving income from sources within New Jersey. The term "critical area state" was also used in this legislation, but the statute's operation was predicated upon the existence of a "*severe* transportation problem" rather than a "*critical* transportation problem." Compare N.J.S.A. 54:8A-61(a) with *id.* at 54:8A-5(a) (emphasis supplied). Subsequent legislation permitted reciprocal agreements with critical area states whereby individuals could be relieved of liability under the Transportation Benefits Tax or the ETT. L. 1976, c. 126, §1, N.J.S.A. 54A:8A-122. Such an agreement was concluded by New Jersey and Pennsylvania on December 20, 1976 and amended by the states on December 31, 1977. As a consequence, the Transportation Benefits Tax is no longer imposed on Pennsylvania residents earning income in New Jersey, and New Jersey residents earning income in Pennsylvania are no longer liable for Pennsylvania state income taxes.

[7] In a separate case decided by the Court in *Pennsylvania* v. *New Jersey*, Maine, Massachusetts and Vermont were denied leave to file original complaints against New Hampshire for an accounting of funds diverted from their treasuries as a result of credit given their residents for taxes paid under New Hampshire's unconstitutional commuter income tax. These states based their claims on the violation of the Privileges and Immunities Clause found by the Court in *Austin*. *Pennsylvania* v. *New Jersey*, 426 U.S. at 661-663, 49 L.Ed.2d at 127-128.

that the Transportation Benefits Tax Act violated the Privileges and Immunities and Equal Protection Clauses, the Court responded:

> The short answer to these contentions is that both Clauses protect people, not States.
>
> [426 U.S. at 665, 49 L.Ed.2d at 129]

New York similarly attempted to challenge the ETT in an original action in the United States Supreme Court, *New York* v. *New Jersey*, 429 U.S. 810, 59 L.Ed.2d at 70 (1976), but the Court denied its motion for leave to file an original complaint, citing *Pennsylvania* v. *New Jersey*, *supra*. New York, therefore, cannot be the real party in interest in this case; its role in financing the litigation is irrelevant to plaintiffs' standing to bring suit.

We conclude that as a matter of New Jersey law, the interests asserted by plaintiffs are personal to them and justiciable in the present suit.[8]

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[8] New Jersey argues that since the issues involve the relationships between New Jersey's and New York's tax laws and since the 1962 agreement constitutes an element of the State's defense, complete adjudication is impeded by New York's absence. This argument is misconceived. This Court may construe the agreement and determine its relevance without the presence of New York as a party. Joinder of New York is not required. See R. 4:28-1. In view of our holding regarding the constitutional significance of the Accord, see *infra* at (slip op. at 32-37), we need not consider whether it would have been desirable to invite New York to participate as a litigant.

Appendix A

III

The Statutory Scheme

The enactment of the ETT in 1961, L. 1961, c. 32, was preceded by extensive studies and hearings on the transportation problems facing the New Jersey-New York metropolitan area. See *Report of the Project Director of the Metropolitan Rapid Transit Commission* (1957) (hereafter *Metropolitan Transit Commission Survey*); *Public Hearings on Assembly Bills No. 16 & 115 and Senate Bill No. 50 before New Jersey Legislature Assembly Committee on Federal & Interstate Relations and Assembly Committee on Highways, Transportation & Public Utilities* (November 24 & December 3, 1958); *Joint Report of the New Jersey Legislature Assembly Committee on Highway, Transportation & Public Utilities and the Committee on Federal and Interstate Relations on A-16, A-115 and S-50* (1958); *Report on Rapid Transit for the New York-New Jersey Metropolitan Area* (1958) (hereafter *Metropolitan Rapid Transit Report*); N.J. State Highway Dep't, Div. of Railroad Transportation, *A Proposal Towards Solving New Jersey's Transportation Problem* (1959); N.J. Governor, 1954 (Meyner), *Memorandum—Proposed Commuter Benefit Tax* (May 2, 1960) (hereafter *Governor's Memorandum*); *Public Hearing before New Jersey Legislature Assembly Appropriations Committee on Assembly Bill No. 65, Emergency Transportation Tax Act* (May 20, 1960) (hereafter *Hearing on Assembly Bill No. 65*). These inquiries focused mainly on the impact of peak-hour transportation demands generated by interstate commuters.[9] See, *e.g., Governor's Memorandum, supra* at 1; *Hearing on*

[9] The changing pattern of commutation—away from rail service towards the use of private automobiles—was another persistent theme in these studies and reports.

Assembly Bill No. 65, supra at 1, 8; *Metropolitan Rapid Transit Report, supra* at 14. Efforts to ease New Jersey's burden culminated in the passage of Chapter 32 of the Laws of 1961.[10] The statute authorized a tax on the income derived by New Jersey residents from sources in another "critical area state" and on the income of residents of another "critical area state" derived from sources within this State. The statute defined "critical area state" to mean

> this State and such other State bordering thereon within which there exists part of an area, another part of which is in this State, and within which area there is, as of January 1 of any year, a critical transportation problem in respect to the transportation of persons and property interstate.
>
> [L. 1961, c. 32, §5(a), N.J.S.A. 54:8A-5(a)]

This authority would be invoked during any year in which the State Highway Commissioner certified the existence of a "critical transportation problem." L. 1961, c. 32, §5(c), N.J.S.A. 54:8A-5(c). Such a certification would entail a finding that

> there is such number of daily commuters between [the] States as to create a severe peak-load demand

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[10] Other proposed solutions—such as a bi-state rapid transit loop and the use of surplus New Jersey Turnpike collections to subsidize railroad passenger service—failed to muster sufficient support. See *Statement of Dwight R. G. Palmer, Commissioner, N.J. State Highway Department, before the New Jersey Senate Committee Investigating the Financial Structure and Operations of the Port of New York Authority* at 4 (Jan. 26, 1961); *Hearing on Assembly Bill No. 65, supra* at 7 (Comments of Stephen Wiley, Counsel to the Governor); *Metropolitan Transit Commission Report, supra* at 57-66 (Appendix B); *Metropolitan Rapid Transit Survey, supra* at 23-34.

> requiring facilities and services, by any means or mode of transportation far in excess of those needed for normal travel outside of usual commuter hours • • •.
>
> [L. 1961, c. 32, §5(b), N.J.S.A. 54:8A-5(b)]

According to a legislative presumption,

> [W]henever the aggregate number of [interstate commuters] • • • exceeds 100,000, that fact reasonably indicates that a critical transportation problem exists.
>
> [*Id.*]

Pursuant to section 5(c) of the act, N.J.S.A. 54:8A-5(c), the State Highway Commissioner certified to the State Treasurer on June 27, 1961, that a critical transportation problem existed in an area partly in New Jersey and partly in New York and that the states of New York and New Jersey were therefore "critical area states" within the meaning of section 5. *1961 Certification of the New Jersey State Highway Commissioner* (hereafter "1961 Certification") at 21.

As enacted the ETT contained a credit provision which would have released New York residents from imposition of the tax by virtue of then existing New York law. The credit allowed out-of-state residents to deduct payments under their home state's income tax from their ETT liability if their home state granted a reciprocal privilege to New Jersey residents. See L. 1961, c. 32, §16, N.J.S.A. 54:8A-16(A). At the time the ETT act became law, New York permitted such a reciprocal tax credit. See 1960 *N.Y.Sess.Laws*, Ch. 563, *N.Y. Tax Law* §640 (repealed). Because ETT and New York Personal

Income Tax rates were identical, see *infra* at (slip op. at 16), the operation of both states' credit provisions would have allowed commuters from either state to avoid paying any income tax to the states where they worked. Thus when originally enacted, the ETT fell exclusively on New Jersey residents earning income in New York, the number of which was far greater than the number of New York residents earning income in New Jersey. See *1961 Certification, supra,* at 7. It is apparent from the hearings held before passage that New York's reciprocal credit had been taken into account in devising the emergency transportation tax. Indeed, the tax was described as having been anticipated by New York since its enactment in 1919 of an income tax with a reciprocal credit provision. See 1919 *N.Y.Sess.Laws,* Ch. 627, §363. It was characterized as simply diverting New Jersey residents' money back to New Jersey.[11]

New York's response to this potential loss of revenue was a prompt repeal of the credit it granted to nonresidents taxed by their home states, and the amendment of its tax law to allow credit only to its own residents paying taxes to other jurisdictions. 1962 *N.Y. Sess. Laws,* Ch. 2, repealing *N.Y. Tax Law* §640 and amending §620.[12] This change in New York law pre-

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[11] See *Hearing on Assembly Bill No. 65, supra* at 11 (Remarks of Stephen Wiley, Counsel to the Governor: "We are not getting something which doesn't belong to us. We are not getting $40 million for nothing. We are simply 41 years late getting what we should have gotten all the way along.").

[12] Such a response by New York was not completely unexpected. Serious concern was expressed during deliberations on the ETT

(Footnote continued on following page)

vented New Jersey commuters from deducting ETT payments from their New York income tax liability and had the effect of subjecting New York residents to the ETT at the time, however, no credit provision existed which would have released New Jersey residents from their ETT liability. See L. 1961, c. 32, §16; L. 1961, c. 129, §9. As a result, New Jersey residents were liable for both New York Personal Income Tax and the ETT on income earned in New York, while New York residents were liable for only the ETT on income derived from sources in New Jersey.

Subsequent negotiations between officials of the two states resulted in a more balanced arrangement for taxing income earned in one state by residents of the other. On May 6, 1962, the Governors of New York and New Jersey issued a statement embodying the terms of this agreement. New York would allow its residents a credit against New York State personal income taxes for payments to New Jersey under the ETT, pursuant to the legislation enacted earlier in 1962. See 1962 *N.Y. Sess. Laws Ch.* 2, *N.Y. Tax Law* §620. The Governor of New Jersey would propose legislation granting credit to New Jersey residents against their ETT liability for income taxes paid to New York. Such legislation was passed on June 5, 1962. L. 1962, c. 70, §4, N.J.S.A. 54:8A-16(B). Both states' credits were given retroactive effect be-

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(Footnote continued from preceding page)

Act that its passage would prompt New York to effect double taxation of New Jersey commuters. However, it was thought "practically impossible or illegal" for New York to deny New Jersey residents an income tax credit. *Governor's Memorandum, supra* at 3-4. See *Public Hearing on Assembly Bill No. 65, supra* at 11-12 (Comments of Stephen Wiley, Counsel to the Governor), 25 (Comments of Mrs. Kenneth B. Smith, Vice-President of League of Women Voters of New Jersey).

ginning January 1, 1961. L. 1962, c. 70, §13; 1962 *N.Y. Sess. Laws,* Ch. 2, §7.

The 1962 amendment to the ETT act, L. 1962, c. 70, provided that the Division of Taxation, Department of the Treasury, could be regulation relieve New Jersey residents of the obligation to file an ETT return "[i]f it shall appear to the satisfaction of the [D]ivision, based upon an opinion of the Attorney General," that the credit given for taxes paid to another critical area state would be "substantially sufficient to offset" the liability under the ETT. L. 1962, c. 70, §6, N.J.S.A. 54:8A-19(b). Later that year the Attorney General issued Formal Opinion No. 1 which expressed the view required by the amendment. *Atty. Gen. Op. No. 1* (1962). The Division of Taxation accordingly issued a regulation excusing New Jersey residents from filing ETT returns. *N.J. Tax Reg.* No. 1963-1, N.J.A.C. 18:10-11.3.

The fact that New York income taxes offset ETT assessments was not fortuitous. As originally enacted and subsequently amended, rates under ETT have been set to equal those of the New York personal income tax. Compare L. 1961, c. 32 with 1960 *N.Y. Sess. Laws Ch.* 563; L. 1972, c. 12, N.J.S.A. 54:8A-6.3 (tax surcharge) with 1972 *N.Y. Sess. Laws Ch.* 1, *N.Y. Tax Law* §601-B (tax surcharge); L. 1978, c. 131, N.J.S.A. 54:8A-6, with 1977 *N.Y. Sess. Laws Ch.* 70 & 1978 *N.Y. Sess. Laws Ch.* 70, *N.Y. Tax Law* §602. Consequently no New Jersey resident has ever paid any emergency transportation taxes, although they have paid a monetary equivalent to New York under the New York Personal Income Tax. Conversely, since the New York-New Jersey metropolitan area is the only "critical area" ever certified under the act, only New York residents have in fact paid the emergency transportation tax. They in turn have received credit

exempting them from payment to New York of the New York Personal Income Tax. See, *e.g.*, 1961 *Certification, supra,* at 20-21; 1970 *Certification of the Commissioner of Transportation* at 20-21; 1977 *Certification of the Commissioner of Transportation* at 11-12.

The tax is imposed on income "derived from sources within" New Jersey, defined to include

> such income and gain from all property owned[13] and from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, and from all business, trade, profession or occupation carried on, in [New Jersey].
>
> [N.J.S.A. 54:8A-4 (footnote added)]

Under N.J.S.A. 54:8A-20, all ETT receipts are allocated to a special "Transportation Fund." They may be used only for the financing of projects and programs designed to alleviate transportation problems between New Jersey and the other critical area state—New York. Disbursements are to be "screened" to insure proper use of ETT money. N.J.S.A. 54:8A-20(b). Misapplication of the Transportation Fund automatically entitles each contributor to a refund equalling his pro rata share of the monies illegally disbursed. N.J.S.A. 54:8A-22.

After July 1, 1976, the scheme of taxation in New Jersey was profoundly altered. With the passage of the Gross Income Tax Act, N.J.S.A. 54A:1-1 *et seq.*, New Jersey residents and all non-residents earning income in New

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[13] By this provision, non-commuting New Yorkers are also subject to this tax. Plaintiffs have not alleged that they pay ETT on income other than wages or salaries earned in New Jersey.

Jersey[14] became subject to a levy of 2% on taxable income up to $20,000 and 2.5% on the excess income over $20,000. N.J.S.A. 54A:2-1. Individuals now subject to both the New Jersey Gross Income Tax and the ETT are liable for a sum equal to the greater of the two taxes. N.J.S.A. 54:8A-119.[15] Under the present scheme, the ETT amount due will always be greater since the ETT rates are pegged to the New York personal income tax rate. Compare N.J.S.A. 54:8A-6 (ETT rates from 2% to 15%) with N.J.S.A. 54A:2-1 (Gross income tax rates from 2% to 2½%). However, the full amount of tax collected using ETT rates no longer goes into the Transportation Fund. The amount that would be due by imposition of the Gross Income Tax is deposited in the Property Tax Relief Fund, as are all Gross Income Tax receipts. N.J.S.A. 54:8A-121; N.J.S.A. 54A:9-25; see *N.J.Const.*, Art. VIII, §1, par. 7. Only the excess, which results from application of the higher ETT rates, is allocated to the Transportation Fund. N.J.S.A. 54:8A-120.

As originally enacted, the ETT was to expire on December 31, 1970. L. 1961, c. 32, §57. However, the Legislature extended its life to December 31, 1980. L. 1969, c. 36, N.J.S.A. 54:8A-57. Every year since 1962, the Commissioner of Transportation has certified that a "critical transportation problem" exists in the New York-New Jersey area, and the tax has been collected.

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[14] Only that portion of a non-resident's income derived from sources within New Jersey is subject to the Gross Income Tax. N.J.S.A. 54A:5-5; see N.J.S.A. 54A:5-6 to -8. The same is true regarding the ETT. N.J.S.A. 54:8A-2(b); see N.J.S.A. 54:8A-4, -33(a).

[15] The Income Tax Act originally repealed the ETT. L. 1976, c. 47, N.J.S.A. 54A:9-22. However, this repeal was rescinded before its effective date by L. 1976, c. 65, §1.

Appendix A

IV

The Privileges & Immunities Clause

Stressing the importance of the traditional presumption in favor of a statute's constitutionality, the trial court concluded that the ETT "embodies a rational and equitable allocation of the burdens of state government." Although the court correctly recited the rule of "substantial equality" that governs analysis under the Privileges and Immunities Clause, see *U.S.Const.*, Art. IV, §2; *Austin* v. *New Hampshire, supra,* we conclude that it failed to apply the principle properly to the facts of this case. The court also erred in upholding New Jersey's taxing scheme on the basis of an executive agreement between New York and New Jersey regarding the taxation of each other's residents.

A

The Standard of "Substantial Equality"

Article IV, §2, cl. 1 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.[16]

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[16] As the Supreme Court noted in *Austin*, "[f]or purposes of analyzing a taxing scheme under the Privileges and Immunities Clause the term 'citizen' and 'resident' are essentially interchangeable." 420 U.S. at 662 n.8, 43 L.Ed.2d at 536 n.8. See *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 78-79, 64 L.Ed. 460, 469 (1920).

Although the text does not define the privileges and immunities of national citizenship, it is clear that an interest at stake in this case—the pursuit of one's livelihood free from economic discrimination—is protected by the clause. In its most recent expression of the scope of the Privileges and Immunities Clause, the United States Supreme Court unanimously held that the pursuit of an occupation outside one's home state is a constitutionally protected right. See *Hicklin* v. *Orbeck*, 437 U.S. at 524-525, 57 L.Ed.2d at 404. This principle is well-settled.

> [I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.
>
> [*Toomer* v. *Witsell*, 334 U.S. 385, 396, 92 L.Ed. 1460, 1471 (1948) (footnote omitted)]

Travis v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 64 L.Ed. 460 (1920); *Ward* v. *Maryland*, 79 U.S. (12 Wall) 418, 20 L.Ed. 449 (1871). The method by which New Jersey allegedly discriminates against non-residents involves another aspect of the privileges and immunities of national citizenship—" 'an exemption from higher taxes or impositions than are paid by the other citizens of the state.' " *Austin* v. *New Hampshire*, 420 U.S. at 661, 43 L.Ed.2d at 535 (quoting *Corfield* v. *Coryell*, 6 F.Cas. 546, 552 (C.C.E.D.Pa. 1825) (No. 3, 230)); see *Ward* v. *Maryland*, *supra*.

Although legislatures "possess the greatest freedom in classification" in the area of taxation, *Madden* v. *Kentucky*, 309 U.S. 83, 88, 84 L.Ed. 590, 593 (1940), when a violation of the Privileges and Immunities Clause

is alleged, the standard of judicial review must be "substantially more rigorous" than a mere search for rationality in order to "protect [that] constitutional value from erosion." *Austin* v. *New Hampshire*, 420 U.S. at 662-663, 43 L.Ed.2d at 535-536. Absolute equality is not required, however. Inexactitude is permissible when a state fairly attempts to distribute the burdens and costs of government to those receiving its benefits:

> It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents.
>
> [*Travelers' Ins. Co.* v. *Connecticut*, 185 U.S. 364, 371, 46 L.Ed. 949, 954 (1902)]

As announced by the Supreme Court in *Austin*, the rule that has developed is one of "substantial equality of treatment." 420 U.S. at 665, 43 L.Ed.2d at 537.

While invoking close scrutiny, disparity of treatment does not violate this rule if it has a valid justification independent of mere citizenship.

> Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.
>
> [*Toomer* v. *Witsell*, 334 U.S. at 396, 92 L.Ed. at 1471 (footnote omitted)]

See *Hicklin* v. *Orbeck, supra.* A state may therefore impose upon non-residents the additional expenses occasioned by their activities within the state, or the reasonable costs of benefits which they receive from the state. See *Mullaney* v. *Anderson,* 342 U.S. 415, 417, 96 L.Ed. 458, 461-462 (1952); *Toomer* v. *Witsell,* 334 U.S. at 398-399, 92 L.Ed. at 1472-1473; *Travelers' Ins. Co.* v. *Connecticut,* 185 U.S. at 368-369, 46 L.Ed. at 953. See also *Baldwin* v. *Montana Fish and Game Com'n,* 436 U.S. at 402-406, 56 L.Ed.2d at 377-380 (Brennan, J., dissenting); *Davis* v. *Franchise Tax Bd.,* 71 Cal. App.3d 998, 139 Cal.Rep. 797 (Ct.App. 1977).

Although the trial court correctly described the criteria for justifying disparate treatment of non-residents, it did not properly apply them. As the Supreme Court stated in *Toomer* and reiterated in *Hicklin,* "a 'substantial reason for the discrimination' would not exist • • • 'unless there is something to indicate that non-citizens constitute a *peculiar source* of the evil at which the statute is aimed.'" *Hicklin* v. *Orbeck,* 437 U.S. at 525-526, 57 L.Ed.2d at 404 (quoting *Toomer* v. *Witsell,* 334 U.S. at 398, 92 L.Ed. at 1460). Contrary to the trial court's ruling, the burden of demonstrating that non-residents are the "peculiar source" clearly lies with the State. *Hicklin* v. *Orbeck,* 437 U.S. at 526, 57 L.Ed.2d at 405. Once that is proven, the court must then determine whether that discrimination bears a "substantial relationship to the particular 'evil' [the non-residents] are said to present." *Id.* at 527, 57 L.Ed.2d at 405.

Applying this two-fold analysis to the facts before us, we reject plaintiffs' claim that as a matter of law, a transportation problem cannot serve to justify a commuter tax on non-residents. Plaintiffs argue that the

Austin Court rejected such a rationale when it invalidated New Hampshire's commuter income tax on non-residents.[17] In that case, however, New Hampshire did not claim that commuters contributed in any way to a local transportation emergency, nor did that state even allege the existence of such an emergency. The only purpose served by New Hampshire's tax was that of diverting revenue into its general fund. See 420 U.S. at 666, 43 L.Ed.2d at 538.

Were the sole purpose of New Jersey's ETT simply that of diverting revenue for general state purposes, we would similarly conclude that the tax violates the Privileges and Immunities Clause. However, we agree with the State that a transportation problem can serve as a valid independent justification for a discriminatory tax.[18] Unlike the situation in *Austin*, plaintiffs here challenge a specific statutory scheme calling for a transportation tax designed to fund only transportation-related expenditures.

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[17] The mechanics of the ETT are strikingly similar to the invalidated New Hampshire tax. That state taxed non-residents at the rate they would have been taxed by their home states. Because of credits granted by their home states, their total yearly tax liability, like that of New York residents subject to the ETT, remained unchanged.

[18] Plaintiffs also allege that the transportation justification advanced by the State is a "sham," pointing to the fact that the ETT rate structure has consistently been amended to conform to New York's personal income tax, and never in response to any determined change in New Jersey's transportation needs. However, if the practical effect of the tax can be shown to comport with the rule of "substantial equality," the source of the rates employed becomes irrelevant.

While the possibility of a "valid independent reason" exists, we are unable to conclude on the present record that the State has sustained its burden. Acting Transportation Commissioner Mullen testified during his deposition that the problem creating the "transportation emergency" is peak-load commuter demand. Other evidence, however, shows that New York to New Jersey commuters are far outnumbersd by New Jersey residents commuting to New York. See Affidavit of Russell H. Mullen, Acting Commissioner of Transportation at 4; see also Tri-State Regtional Planning Commission, *1970 Census Worker File* (1975); *1977 Certification of Commissioner of Transportation* at 9; *1970 Certification of Commissioner of Transportation* at 11. While commuters living in New York need not be the sole cause of New Jersey's transportation crisis to justify discriminatory treatment,[19] more than merely their identification is required. The State's burden of showing that non-residents constitute a "peculiar source" of an evil would be stripped of meaning if that obligation could be discharged simply by referring to a problem to which non-residents make but a small contribution. Imposition of the ETT cannot be justified if it appears that the tax burden on New York residents is substantially disproportionate to their burden upon New Jersey's transportation facilities.

This is not to say that non-resident commuters cannot be charged for any benefits resulting from New Jersey's subsidization of commuter transportation facilities and expenditures for highway construction and maintenance in

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[19] See *Hichlin* v. *Orbeck*, 437 U.S. at 526, 57 L.Ed.2d at 404, where the Court refers to non-residents "caus[ing] *or exacerbat*[*ing*] the problem the State seeks to remedy * * *." (Emphasis supplied).

northern New Jersey. The Constitution does not entitle non-residents commuters to a "free ride." The State may exact from them a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause.

The record discloses that expenditures for highway construction and maintenance in northern New Jersey amounted to $910 million during the years 1970 through 1977. Since none of these funds came from emergency transportation taxes,[20] non-residents apparently did not contribute to the cost of providing these vital transportation facilities.[21] The expenditure figures introduced also indicate, however, that ETT funds have supplied a very substantial portion of state expenditures for bus and rail facilities. While non-resident use of such facilities constitutes a very small percentage of total patronage,[22] we recognize that a strict percentage analysis is not required for each separate type of commuter transportation facility. Under the constitutional mandate of "substantial equality," it is only necessary that total payments of the ETT by non-resident commuters be substantially propor-

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[20] See Affidavit of Richard B. Standiford. Since 1976, ETT funds have been held in reserve pending the outcome of this litigation. However, pursuant to L. 1977, c. 138, ETT funds have been called into use for certain highway projects.

[21] It is necessary to ascertain on the basis of a full record whether commuters have provided funds for highway purposes in any other manner during the entire life of the ETT. Presently the record contains data for only an eight-year period.

[22] For example, in the fiscal years 1970 to 1977, ETT funds accounted for approximately 75% of railroad subsidies and approximately 20% of the bus operator subsidies, but New York to New Jersey commuters comprised less than 3% of the ridership.

tionate to the total benefit they derive by virtue of State expenditures for all types of commuter facilities. Stated differently, the ETT would be justified if its burden on New York commuters is substantially commensurate with the benefit they derive from their use of New Jersey's transportation facilities.

The State also emphasizes that New Jersey residents pay other taxes—such as property taxes and sales and use taxes—which non-residents either do not pay or pay substantially less. This assertion has sparked a sharp dispute between the parties as to what tax liabilities can be compared in asserting whether non-residents are in fact being required to pay more than their fair share. Plaintiffs allege that *Austin* made clear that only taxes to which non-residents are not subject can be compared with a discriminatory impost. See *Austin* v. *New Hampshire*, 420 U.S. at 659 n.3, 662 n.8, 43 L.Ed.2d at 534 n.3, 536 n.8. Noting that property taxes are paid by any non-resident who owns property in New Jersey, plaintiffs argue that such taxes do not qualify as "taxes imposed upon residents alone" under *Austin*. See 420 U.S. at 665, 43 L.Ed.2d at 538.

We do not agree that taxes which non-residents may pay must be excluded from the "substantial equality of treatment" analysis. While " 'something more is required than bald assertion' • • • to establish the validity of a taxing statute that on its face discriminates against non-residents," *Austin*, 420 U.S. at 655 n.10, 43 L.Ed.2d at 538 n.10 (quoting *Mullaney* v. *Anderson*, 342 U.S. at 418, 96 L.Ed. at 462), the question is still one of impact in fact. The State has introduced evidence lending support to the conclusion that residents pay a much greater percentage of New Jersey's property and sales taxes than non-residents. The discriminatory impact of the ETT

cannot be offset, however, by the fact that residents pay more total tax dollars than non-residents. Even a *per capita* comparison is inappropriate unless its scope is restricted to collections for transportation services, the asserted ground of justification for the ETT. To sustain the tax, there must be a showing that the impact of ETT on non-residents, along with their other contribuions for public transportation expenses, is substantially offset by the benefits they receive from transportation services.

The State introduced the affidavit of John F. Laezza, Director of the Division of Local Government Services, Department of Community Affairs, in which he asserts that "[i]n 1975 the municipalities and county governments in the ten northern counties spent approximately $12,645,000 for services directly allocable to commuters from New York." This figure allegedly represents the non-resident commuters' pro rata share of the total public safety and public works expenditure made by the ten counties and their municipalities. As explained by Director Laezza, this strict percentage computation was based on the theory that a person who commutes to and works in New Jersey for a part of the day utilizes these facilities to the same extent as a New Jersey resident.[23] This assumption is questionable; moreover, it is only to the extent these benefits arise from local maintenance of transportation facilities that they should be included in the constitutional analysis.

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[23] Director Laezza testified at his deposition that he computed this figure by calculating the number of New York to New Jersey commuters as a percentage of the total population of the ten northern counties (including these commuters) and then allocating to the non-resident commuters that percentage of the total expenditures for public safety and public works in the ten counties.

Appendix A

We reject the State's argument that since the effect of the challenged tax is in fact no more onerous than the liability taxpayers would otherwise incur to New York, it does not violate the privileges and immunities of non-residents. As the Supreme Court noted in *Austin*, while such an argument may have "initial appeal, it cannot be squared with the underlying policy of comity to which the Privileges and Immunities Clause commits us." 420 U.S. at 666, 43 L.Ed.2d at 538.

The evidence here presented falls far short of showing that the non-residents are taxed only to the extent of their contribution to the transportation problem. We are therefore unable to apply the correct constitutional standard of "substantial equality" to the record before us. A remand is accordingly necessary to permit a full exploration of the benefits and burdens to non-residential commuters occasioned by State transportation programs and imposition of the ETT. In view of our disposition of this case, we now set out guidelines for further trial proceedings.

On remand, evidence should be introduced to enable the trial court to compare the transportation benefits New York residents receive and the tax contributions they are required to make. The data must therefore include statistics on annual state and local expenditures—identified by source—for commuter rail and bus services and for construction and maintenance of highways used by interstate commuters. Figures on the amount and application of ETT monies must also be presented.[24] Commutation

[24] The evidence thus far presented covers only the years 1970-1977. The entire effect of the ETT should be determined from a full record of its operation. Inequality in any single year may not be indicative of overall inequality. "Oversubsidization" in one area may be offset by "undersubsidization" in another.

figures must be introduced for the years during which non-residents paid emergency transportation taxes. The total number of New Jersey to New York commuters and the proportion by which they exceed New York to New Jersey commuters would be a relevant consideration. Travel figures must also take into account the substantial amount of intrastate use of all facilities funded.

Only when the State supplies such an accounting can the relationship between benefits and burdens be properly assessed. Once these computations are submitted, the court can then make a fully informed judgment on whether the problems of peak-hour commutation by New York residents justifies imposition of the ETT.

B

The 1962 "Accord"

The parties disagree over the existence and legal effect to be given the alleged "accord," "agreeemnt" or "arrangement" entered into by New York and New Jersey in 1962. See *supra* at —— (slip op. at 3-4).

Plaintiffs argue that no such agreement ever existed and that the alleged accord was nothing more than a joint press release by the two governors. They note that the only "agreement" in the record relates solely to procedures for tax withholding. Defendant contends that the states of New York and New Jersey had entered into a "reciprocal arrangement" to apportion equitably the financial burdens of government among citizens who live in one state and earn income in the other. Since this arrangement insured that commuters from New York would suffer no "additional overall tax burden," the State

maintains that the scheme is not repugnant to the Privilileges and Immunities Clause. The trial court agreed, noting that

> It boggles the mind to consider a situation where two states could not make adjustments between them and pass reciprocal-type legislation (which would allow either to pass tax laws) whereby the citizens of two states were not financially affected.

The trial court erred in its assessment of the effect of such interstate agreement. We need not decide, therefore, whether the existence of an enforceable interstate agreement would save the present scheme from invalidity. Even assuming, as the State claims, that New York could restrict its prerogative for fashioning tax policy by agreement with New Jersey, it is clear that New York has not done so here.

In the recent case of *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 54 L.Ed.2d 682 (1978), the United States Surpeme Court addressed claims that the Multistate Tax Compact entered into by seven states creating a Multistate Tax Commission violated the Compact Clause of the Federal Constitution, *U.S. Const.*, Art. I, §10, cl. 3,[25] since no congressional approval had been given. The Court held that no violation had occurred since no state had relinquished any of its sovereign power in entering the compact. Under Article VII of the compact, the Multistate Tax Commission was given the power to adopt advisory regulations which would have "no force in any member State until adopted by that State in accordance with its own law." 434 U.S. at 457, 54 L.Ed.2d

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[25] "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State * * *."

at 692. If any State chose to adopt the proposed regulations, it could request the Commission to perform an audit. The Commission could seek compulsory process in aid of its auditing power in the courts of any state that had specifically adopted Article VIII of the compact by statute. Individual states retained *"complete control over all legislation and administrative action* affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due." 434 U.S. at 457, 54 L.Ed.2d at 692 (emphasis supplied).

After an exhaustive survey of the history of the Compact Clause, the Court rejected a literal interpretation which

> would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.
>
> [434 U.S. at 459, 54 L.Ed.2d at 694]

Instead, the Court reaffirmed the view that the

> "application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' "
>
> [434 U.S. at 471, 54 L.Ed.2d at 701 (quoting *New Hampshire* v. *Maine,* 426 U.S. 363, 369, 48 L.Ed. 2d 701 (1976) and *Virginia* v. *Tennessee,* 148 U.S. 503, 519, 37 L.Ed. 537, 543 (1893)]

Under that rule, the Multistate Tax Compact was held not to require congressional approval:

> [T]he test is whether the Compact enhances state power quoad the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission: each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, as noted above each State is free to withdraw at any time.
>
> [434 U.S. at 473, 54 L.Ed.2d at 702]

Following this analysis it is clear that if the 1962 Accord were interpreted to bind New York's power over the extension of tax credit to its residents, it would involve an impermissible relinquishment of that state's sovereign power. New Jersey would then be able to dictate portions of New York's taxation policy by enforcing the terms of the Accord. Under the rule of *United States Steel Corp.* v. *Multistate Tax Commission*, such an agreemest requires congressional approval. Since no such approval was given, the Accord cannot be relied on by the State here as an enforceable agreement. The credit granted by New York is a matter of legislative grace upon which New Jersey may not rely to support the constitutionality of the ETT:

> [T]he constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State.
>
> [*Austin* v. *New Hampshire*, 420 U.S. at 668, 43 L.Ed.2d at 539]

Since the present interaction of the ETT with New York's personal income tax law is susceptible to change at any

time by the legislature of either state, the ETT must independently pass muster under the Privileges and Immunities Clause.

The parties also disagree over the effect of a footnote in the *Austin* opinion regarding interstate cooperation in tax matters. The footnote reads:

> Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treatment of nonresidents by States that coordinate their tax laws.
>
> [420 U.S. at 67 n.12, 43 L.Ed.2d at 539, n.12]

In light of *Austin's* explicit statement that the constitutionality of a state's laws cannot depend upon the laws of a sister state, any reference to such interstate cooperation cannot be read to mean that the laws of an individual state need not withstand independent scrutiny under the Privileges and Immunities Clause. Reciprocally favorable treatment of non-residents does not violate the Privileges and Immunities Clause; New Jersey's unfavorable treatment of New York residents may. Resolution of this issue must await a full record.

V

Equal Protection

Plaintiffs allege that the ETT violates the Equal Protection Clause of the Fourteenth Amendment by placing an impermissible burden on their right to travel. They

claim that since this right is "fundamental" the State must show that the ETT serves some "compelling state interest."

The constitutional right to travel interstate, as interpreted by the United States Supreme Court, is not implicated in this case. This right does not encompass mere movement. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 255, 39 L.Ed.2d 306, 313 (1974). It concerns interstate migration—the right "to migrate, resettle, find a new job, and start a new life." *Shapiro* v. *Thompson*, 394 U.S. 618, 629, 22 L.Ed.2d 600, 612 (1969). For the State to be required to show a compelling interest, the classification must penalize the exercise of the right of migration. *Memorial Hospital* v. *Maricopa County*, 415 U.S. at 258, 39 L.Ed.2d at 315; *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274 (1972); *Shapiro* v. *Thompson*, 394 U.S. at 634, 638 n.21, 22 L.Ed.2d at 615, 617 n.21.

Since migration is not involved in this case, plaintiffs' attempt to clothe the right to travel protected by the Privileges and Immunities Clause as a "fundamental interest" under the Equal Protection Clause is misconceived. Plaintiffs do argue that the residency classification embodied in the ETT deters "migration" from New Jersey to New York. However, it is clear that these New York residents lack standing to assert the equal protection claims of New Jersey residents. See *Craig* v. *Boren*, 429 U.S. 190, 193-195, 50 L.Ed.2d 397, 404-405 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830 (1973); *United States* v. *Raines*, 362 U.S. 17, 4 L.Ed.2d 524 (1960).

We also reject plaintiffs' attempt to characterize non-residents as a "suspect class." No decisional law supports such an interpretation. *Austin* is cited for the proposition that non-residents are not represented in New Jersey's Legislature—one characteristic of a suspect class. In that case, however, it was unnecessary to address the non-resident plaintiffs' equal protection claims in light of its disposition of the privileges and immunities issue. 420 U.S. at 668, 43 L.Ed.2d at 539. Similarly, in *Hicklin* and *Mullaney*, the Court did not reach the equal protection claims once a violation of the Privileges and Immunities Clause was found. *Hicklin*, 437 U.S. at 534 n.19, 57 L.Ed.2d at 410 n.19; *Mullaney* v. *Anderson, supra.* In *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371, 56 L.Ed.2d 354 (1978), the Court held that a legislative classification based on residency need only be rational to be valid under the Equal Protection Clause. See 436 U.S. at 389, 390, 56 L.Ed.2d at 369. We therefore conclude that non-residents are not a suspect class and that application of the strict scrutiny standard under the Equal Protection Clause is not required.

Since no fundamental interest or suspect class is here involved, the trial court was correct in assessing the ETT under the "rational relation" standard. See *San Antonio Sch. Dist.* v. *Rodriquez*, 411 U.S. 1, 36 L.Ed.2d 16 (1973); *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393 (1961); *Taxpayers Ass'n of Weymouth Tp.* v. *Weymouth Tp.*, 80 N.J. 6, 39-40 (1976), *cert.* den. *sub. nom. Feldman* v. *Weymouth Tp.*, 430 U.S. 977, 52 L.Ed.2d 373 (1977).

In determining whether the classification employed by the State bears a rational relation to a legitimate governmental purpose, it is important to remember that states have been accorded great latitude in the field of taxation:

Appendix A

> Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.
>
> [*Madden* v. *Kentucky*, 309 U.S. 83, 88, 84 L.Ed. 590, 593 (1940) (footnotes omitted)]

See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 35 L.Ed.2d 351 (1973); see also *McKenney* v. *Bryne*, —— N.J. —— (1980). There is no question that the alleviation of a "transportation emergency" is a legitimate governmental purpose. The remaining issue is whether there is any reasonably conceivable state of facts which would afford a rational basis for imposing the ETT only on the class consisting of New York residents earning income in New Jersey. We conclude that there is. New York residents who commute to New Jersey contribute significantly to the excessive demands placed on New Jersey's transportation facilities in the New York-New Jersey area. It is certainly conceivable that New Jersey residents are called upon to pay their fair share of transportation costs by the operation of other state and local taxes. Mathematical equality of impact is not required. *Dandridge* v. *Williams*, 397 U.S. 471, 485,

25 L.Ed.2d 491, 501-502 (1970).[26] Again, the nature of the field of taxation requires judicial tolerance of imperfections in legislative schemes:

> In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal scheme become subjects of criticism under the Equal Protection Clause.
>
> [*San Antonio Sch. Dist.* v. *Rodriquez*, 411 U.S. at 41, 36 L.Ed.2d at 48 (footnote omitted)]

Plaintiffs have not met their burden of demonstrating that the classification lacks any rational absis. *Madden* v. *Kentucky*, 309 U.S. at 88, 84 L.Ed. at 593; *Taxpayers Ass'n of Weymouth Tp.*, 80 N.J. at 40. We therefore affirm the ruling of the trial court upholding the ETT under the Equal Protection Clause.

VI

Disposition

We conclude that a ruling on the constitutionality of the ETT cannot be made on the present record. As noted above, the trial court failed to apply the proper analysis under the Privileges and Immunities Clause. By drawing the issue too narrowly—"whether or not the *Austin* case is dispositive of the [ETT] legislation"—the court could not resolve the factual issue of whether non-residents

---

[26] Thus, the fact that there may be some non-commuting New York residents who must pay the ETT does not necessarily invalidate the classification under the Equal Protection Clause.

have been overcharged.[27] The complexity of this determination and the far-reaching effects of a decision on the issue of the statute's constitutionality make this case inappropriate for the summary disposition requested by the parties. See R. 4:67. A full record should therefore be developed. *Cf. Jackson* v. *Muhlenberg Hospital,* 53 N.J. 138, 142 (1969) (a "maximum of caution" is necessary when a ruling would "reach far beyond the particular case."); *Swiss Village Assocs.* v. *Mun. Council of Wayne Tp.,* 162 N.J.Super. 138, 142 (App.Div. 1978); *Lusardi* v. *Curtis Point Prop. Owners Ass'n,* 138 N.J. Super. 44, 51 (App.Div. 1975); *Bennett* v. *T & F Distrib. Co.,* 117 N.J.Super. 439, 445-446 (App.Div. 1971), certif. den., 60 N.J. 350 (1972).

We therefore remand the matter to the trial court for proceedings consistent with this opinion. The court should follow the legal analysis outlined above, which requires the State to produce evidence enabling the court to determine whether the tax imposed on non-residents charges them only for their share of the transportation problem they cause or the benefits they receive. While mathematical certainty is not required, see *Travelers' Ins. Co.* v. *Connecticut,* 185 U.S. at 371-372, 64 L.Ed. at 954, the present record does not support a conclusion that the discrimination practiced against non-residents bears the requisite "close relation" to the "transportation emergency" advanced as its justification. See *Toomer* v. *Witsell,* 334 U.S. at 396, 92 L.Ed. at 1471.

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[27] We agree with the trial court, however, that the act itself contains the necessary safeguards for ensuring application of funds collected to transportation facilities serving commuters. We therefore do not determine whether there has been any misapplication of funds as the statute has been applied.

Appendix A

The judgment of the Superior Court, Chancery Division, is vacated insofar as it declares the Emergency Transportation Tax Act constitutional under the Privileges and Immunities Clause. The matter is remanded for a plenary hearing consistent with this opinion.

APPENDIX B

Opinion of the Superior Court of New Jersey, Chancery Division, dated October 24, 1978 (as amended October 31, 1978 and November 8, 1978)

October 24, 1978

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Re: John Salorio, et al. v. Sidney Glaser, Director of the Division of Taxation, Dept. of the Treasury of the State of New Jersey.
Docket No. C-3628-76

Gentlemen:

I. Introductory Statement

Plaintiffs, Salorio, et al. challenge the constitutionality of N.J.S.A. 54:8A-1-57 and the so-called "Emergency Transportation Tax" called for therein. They rely on the United States Supreme Court decision of *Austin* v. *New*

Hampshire, 420 U.S. 656 (1975). In a preliminary statement in their brief in support of their motion for summary judgment plaintiffs note:

> In *Austin*, the Supreme Court struck down a commuter tax imposed by New Hampshire upon nonresidents which was identical in its operation and discriminatory effect to the New Jersey commuter tax imposed upon New Yorkers.
> (Brief at p. 1)

Plaintiffs urge this Court to accept their position that *Austin* is dispositive of this case. That is the thrust of plaintiffs' attack. Every memorandum or brief submitted by plaintiffs relied upon *Austin*. All of their correspondence commented to *Austin*. At each appearance they urged this Court to accept their theme that the case at bar is indistinguishable from *Austin*.

Defendant, State of New Jersey, also cites *Austin* arguing that *Austin* is not only distinguishable but is supportive of the State's position. It posits that the Act is not only constitutional as written, but morally as well as logically justified.

Now after many thousands of words, after the introduction into evidence of numerous documents and disputes over the admissibility thereof, and after the insertion into this litigation of many side issues, the Court is faced with the same question as initially presented. Simply stated, Is the tax unconstitutional under the doctrine of *Austin* v. *New Hampshire*?

Plaintiffs argue that under the tax one set of rates applies to New Jersey residents, while a different and perhaps a higher set of rates applies to New York residents. (Plaintiffs' brief of October 28, 1977, p. 8.) In that same

brief, plaintiffs, referring to the statutory sections, N.J. S.A. 54:8A-1, *et seq., note*:

> As we shall describe below the 'Emergncy Transportation Tax' more properly should be called 'Commuter Income Tax' or 'Commuter Income Tax on New York Residents' and we shall so refer to it hereafter.

New Jersey, on the other hand, acknowledges the difference in rates but justifies the Act on the theory that a transportation emergency exists and the fund is used exclusively to finance projects and programs to help alleviate the transportation problems between New York and New Jersey. New Jersey further urges this Court to accept as a foundation for sustaining the tax an accord (agreement) reached between the States of New York and New Jersey which precludes the State of New York from now complaining.

That New York is the real party in interest is apparent. The phrase "real party in interest" is not used in any technical sense. The litigation is financed by the State of New York and it is apparent that it is New York and the New York Legislature and administration which is interested in the results hereof. Surely Salorio and the other plaintiffs have little financial interest herein. The credits available to the plaintiffs by the State of New York make it apparent that the ultimate total out-of-pocket tax and the cost to plaintiffs is not affected by the tax here under purview. However, the same was true in *Austin*.

This Court is called upon to decide a constitutional issue that could be rendered moot at any time by either the State of New York or the State of New Jersey with a stroke of a legislative pen. I have delayed rendering this

decision in the hope that the Legislatures of the States of New York and New Jersey would meet their obligations to the public and to their own citizens by determining what should and should not be done to properly balance the burden of interstate commutation costs. The States have failed to act and this Court is called upon to render, in effect, an advisory opinion, well knowing that when the inevitable appellate phases of this litigation have passed, either state that feels aggrieved can by legislative action change the entire result contemplated or suggested by any judicial decree.

A history of this litigation and an examination of the actions and interactions between the states, including the legislative approach of each of the states to the commuter tax problem, is in order.

II. Statement of Facts and History of Litigation

That the interstate transportation problems between New York and New Jersey are undoubtedly more substantial than those of other states is apparent. There have been several interstate compacts and understandings during the past years between New York and New Jersey. The creation of the New York-New Jersey Port Authority (N.J. S.A. 32:1-1, *et seq.*) and the New York and New Jersey Transportation Agency (N.J.S.A. 32:22A-1, *et seq.*) are but two of these formal arrangements intended to deal with the transportation problem. In addition there have been numeruos "understandings" or "agreements" reached between the two states. It is urged by the State of New Jersey that the interstate contracts are only able to deal with rather limited interstate transportation problems and that New Jersey must bear the cost of the operation of

mass transit, busses and trains. The State further urges that the revenues required to fund these interstate transportation projects may properly be raised by taxation. I accept the logic of this argument subject to constitutional limitations.

The Emergency Transportation Tax Act, N.J.S.A. 54:8A-1, *et seq.*, was passed in 1961. New Jersey, at that time, recognized the typical problems in the New York-Nothern New Jersey transportation area. The Act provided that the tax there contemplated was to be imposed only if the State Commissioner of Taxation certified to the State Treasurer the existence of a "critical transportation problem" between New Jersey and a bordering state (N.J.S.A. 54:8A-5(c)). All of the Emergency Transportation Tax revenues are to be paid into a special transportation fund and except for the provision for costs of administering the Act, the funds received are to be used exclusively to finance projects and programs involving transportation problems between New York and New Jersey. See N.J.S.A. 54:8A-20. Section 22 of the Act specifies that if any of the monies in the fund are used for a purpose not proper under the Act, the taxpayer has a right to a refund or credit equal to a prorated share of the fund. Section 57 of the Act provides for the suspension of the tax in the event that any of the monies in the fund are applied to purposes other than those specified in the Act.

Originaly, the Act was applicable solely to New Jersey residents working in New York. This was because the Act provided a credit against the tax for non-residents for "any income tax for the taxable year imposed by another critical area state". This non-resident credit was limited to residents of jurdisdictions which granted similar type credits to New Jersey residents (N.J.S.A. 54:8A-16(A)

(2)(a)). New York granted similar credits to New Jersey residents. Therefore, New Jersey allowed New Yorkers the "non-resident" credit.

In 1962, however, the New York Legislature repealed that portion of the New York Personal income tax law permitting the credit for taxes paid to New Jersey by New Jersey residents working in New York. Since New York no longer granted similar credits to New Jersey residents, New York residents could not claim credit under the Emergency Transportation Act. New York's action was retroactive and the question arose as to the validity of the application thereof. An executive accord was reached between the governors of the two states and the following executive statement emanated on May 6, 1962:

> Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective States as they affect residents of the other State.
>
> Governor Rockefeller announced that New York, under legislation enacted at the 1962 legislative session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.
>
> Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New Jersey Emergency Trans-

portation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

In addition, it was agreed that neither State would contest nor participate in contesting the right of the other to levy and collect the taxes imposed by the two laws on residents of the other; and that each State would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.

The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.

The Governors stated that they are taking this action in the interest of promoting interstate cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will.

Following the statement, New Jersey enacted Chapter 70 of the Laws of 1962 which is still effective, which act

afforded a credit to New Jersey residents against the Emergency Transportation Tax Act for any income tax imposed by New York on income earned within New York (N.J.S.A. 54:8A-16(B). By virtue of the action and interaction between the two states and specifically the action on the part of New York retroactively repealing the "nonresident" credit of the New York personal income tax and the enactment by New Jersey of the Emergency Transportation Tax Act, a result, apparently unintended by the legislation, ensued. The Emergency Transportation Tax is being paid by New Yorkers commuting to work in New Jersey rather than the originally intended persons, that is, New Jersey residents working in New York. Although the Act was originally scheduled to expire on December 31, 1970, it was extended to December 31, 1980. L. 1969, c. 36 (N.J.S.A. 54:8A-57). There was a bit of legislative action whereby the Emergency Transportation Tax Act was repealed at the time of the enactment of the New Jersey gross income tax in 1976, but that action was later reversed by the New Jersey Legislature. Thus, the Emergency Transportation Tax Act continues to be in effect.

The scope of the gross income tax (N.J.S.A. 54A:1-1, *et seq.*) encompasses the income tax under the Emergency Transportation Tax Act and the persons who are subject to the Emergency Tax Act are also subject to the gross income tax. However, the law does provide (N.J.S.A. 54:8A-119) that where an individual is subject to both taxes his liability shall not exceed a sum equal to the greater of the two.

Plaintiffs point out that since 1961 New Jersey has taxed New York residents who derive income in or from the State of New Jersey at rates that range from 2%

to 15% of taxable income but that New Jersey residents paid no income tax whatsoever on their incomes derived in New Jersey until 1976 and that the income rate since that time is but from 2 to 2½% under a statute which was temporary at the time the briefs in this case were drawn. They urge that the legislative scheme which created this discrimination against New York residents is, in fact, the act in question, that is the "New Jersey Emergency Transportation Tax Act". Plaintiffs point out that there is a close similarity between the "Commuter Income Tax on New York Residents" and the income tax that New York State imposes upon people who work in New York, and that changes in the New York statute ordinarily bring about identical changes in New Jersey. In fact, it is urged by plaintiffs that only New York residents are subject to the tax because the statute provides to New Jersey residents working in New York a credit against the tax for income taxes that they pay to New York. Since the New York income tax is identical with the rate in the Commuter Income Tax, residents of New Jersey who work in New York pay taxes to New York which equal the amount of the Commuter Income Tax.

III. Arguments Presented

Plaintiffs' legal argument is based on the Privileges and Immunities Clause of the United States Constitution. Plaintiffs argue that since Art. IV, Sec. 2. Cl. 1, requires each state to treat citizens of every other state on a par with its own citizens, the citizens of New York are entitled to be exempt from any higher taxes or excises than are imposed by New Jersey on its own citizens and they cite *Ward* v. *Maryland*, 12 Wall. 418, 20 L. Ed.

449 (1871) and *Austin* v. *New Hampshire*, 420 U.S. 670, 95 S.Ct. 1191 (1975).

Plaintiffs conclude that a proper application of *Austin* requires this Court to declare the New Jersey Act unconstitutional.

It is also urged by the plaintiffs that a purported "transportation problem" does not and cannot make the Commuter Income Tax constitutional; that the Commuter Income Tax violates the Equal Protection Clause of the United States Constitution by charging New Yorkers far more than their fair share; that the purported transportion problem is irrelevant as a matter of law and is a sham (that is, that in actual operation the Commuter Income Tax bears no relationship to the use by commuters from New York of New Jersey's transportation facilities); and that in general the rationale of *Austin* and the facts justify quick disposition of any defenses raised by the State of New Jersey.

New Jersey, on the other hand, challenges the contention of plaintiffs that the *Austin* case is dispositive of the issues. It urges that plaintiffs have no real interest in this litigation and that the State of New York which has financed and directed this suit is attempting to "cloak the Emergency Transportation Tax in the costume of the New Hampshire Commuter's Income Tax", (defendant's reply memorandum, p. 1) and in so doing is utilizing the holding in *Austin* to avoid a proper and solemn, if not formal, agreement between the two states.

New Jersey concedes that there is some similarlity between the Transportation Tax Act here in New Jersey the New Hampshire tax in that "(1) each tax is effectively incident only on non-resident commuters and (2) under each tax these commuters suffer no financial

harm," *Id.* p. 2, but alleges sufficient differences to warrant this Court's distinguishing *Austin*.

What then do we have before us? New Jersey enacts a tax and plaintiffs state that the *Austin* case compels a determination that the statute is unconstitutional. New Jersey argues that a transportation emergency exists which justifies the tax. Plaintiffs argue that the transportion problem is irrelevant as a matter of law and that *Austin* governs. Plaintiffs urge a blatant violation of the privileges and immunities clause. New Jersey urges that there is no violation of the Privileges and Immunities Clause or the Equal Protection Clause of the federal Constitution as asserted by plaintiffs. Plaintiffs respond that *Austin* governs. New Jersey urges that this case differs from *Austin* in that the tax purposes were different and that in New Jersey there was a specific proper use for the created fund, while in New Hampshire the tax was merely used for general revenue purposes. Plaintiffs reply that the *Austin* case shows no such distinctions and that *Austin* governs. New Jersey urges that the funds created by the tax are expended for the benefit of both New York and New Jersey residents. Plaintiffs reply that by any other name the situation is the same as *Austin*, that, in fact, the benefits do not run to New York commuters in proportion to the taxes paid by them and, again, that *Austin* governs. The State of New Jersey urges that the action of New Jersey under the Emergency Transportation Tax is consistent with the 1962 accord between the two states in question and consistent with the "arrangements" between the two states from 1962 until 1975 when the *Austin* decision came down and that, therefore, New York is an indispensable party to this litigation. Plaintiffs note that *Austin* expressly held that individuals such as plaintiffs have the right to chal-

lenge a commuter income tax on non-residents. They also point out that the Supreme Court has expressly held that New York State is not entitled as a substantive matter to enforce the constitutional claims here asserted. Thus, New York cannot be a "real party in interest", citing *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976).

IV. Discussion

More technicalities have arisen than are justified under the issues raised either by the pleadings or by counsel. First of all, it does not require detailed oral argument and pages of legal memoranda to reach the conclusion that the State of New York per se may not in this litigation raise the question of those constitutional guarantees that extend only to individuals. The crux of *Austin* and *Pennsylvania*, hereinabove cited, make this apparent. It is somewhat surprising that New Jersey urges the "real party in interest" argument in this Court. Equally, it was not necessary for the State of New Jersey to seek depositions and discovery of the administrators of New York State, such as the comptroller. The question before this Court is not a question of dollars. It is a question of principle and right. This Court intends to meet only one issue, the effect of the *Austin* case.

As to questions regarding the actual disposition of the funds, administrative determination is the proper procedure. If in fact those issues are relevant, it may very well be that defendant was correct, in part, that plaintiffs have failed to exhaust their administrative remedies. If, in fact, the legislative enactment and the legislative scheme as formalized by the statute in question is constitutional, and if the goals and aims are permissible, then

remedies exist within the statutory scheme and by separate litigation to correct abuses by this State if there has been any misappropriation of the funds constitutionally taxed and collected from New York residents. Thus the safeguards exist to avoid an unconsitutional application of a constitutional statute.

This Court must and will determine the simple question of whether or not the *Austin* case is dispositive of the legislation.

Some preliminary findings are required:

1. Salorio and the other plaintiffs and others similarly situated are not financially affected by the results of this litigation under the existing state of the law.

2. Only the State of New York is beneficially interested in the results of this litigation from a financial viewpoint. While New York State is, in fact, financing this litigation and in effect directing it through the utilization of the plaintiffs herein, such a situation does not make them the "real parties in interest" to the end that they are indispensable parties to this litigation or that defendant's motion to dismiss on that ground should be granted.

3. There was in 1962 and there continued thereafter an arrangement between the States of New York and New Jersey, their governors and their legislators which accepted as valid the tax situation now being challenged. The position of plaintiffs is that even recognizing such a compact or agreement exists:

> had they (the states) solemnly agreed to it way back when, it would have fallen in 1975 with the Supreme Court finding of unconstitutionality.

(Transcript of February 23, 1978, p. 7, lines 3-6.) This position can only be sustained if the Act is unconstitutional on its face.

4. There is nothing inherently immoral or improper in the states' arriving at a compact or agreement which provides for taxing as suggested and required under the existing statutes. The only challenges there can be to such a compact or arrangement are the arguments proffered in *Austin* that the tax in question violates the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution.

5. The determination by the administrative authorities in New Jersey of the existence of a "transportation crisis" in addition to being presumptively accurate is justified by the facts and the Court finds that such a problem exists.

6. The purposes expressed in the statute for the utilization and allocation of the funds collected under the challenged tax are valid and bear a direct relationship to the crisis referred to.

7. That purpose is to alleviate transportation problems encountered by interstate commuters, and thus, if the Act is administered in accordance with the express purposes, then in fact taxpayers, such as plaintiffs, will receive a direct benefit from the expenditure of the funds. The Court does not pass on the quantum of the benefit at this time. The Court notes that the revenues from the New Jersey tax should be used solely to alleviate transportation problems encountered by the interstate commuters. If this is not being done, other remedies are afforded to the plaintiffs. See N.J.S.A. 54:8A-22.

Appendix B

8. It is fundamentally fair that a state receive funds from non-state residents who work in that state for the services rendered by the state for their benefit, whether it be transportation or other services.

This Court is under the solemn obligation to follow the doctrines involving federal law set down by the Supreme Court of this country. *Austin* v. *New Hampshire* is now a part of the supreme law of the land. *Austin* declared unconstitutional the taxing statute of the State of New Hampshire. The holding in *Austin* is here being utilized by plaintiffs as the standard by which to measure the constitutionality of the Emergency Transportation Tax Act of this State. In challenging the constitutionality of a statute in this court, the challenger is faced with all of the law raising presumptions in favor of the legislation in question at every level of the litigation.

By enactment of legislation, a constitutional measure is presumed to be created. The courts will not, save in very limited circumstances, presume that a legislative body exceeded its authority or intended to violate the Constitution. This presumption is based, at least in part, on the doctrine of separation of powers which forbids one branch of goverment to encroach on the duties and powers of another. The legislative branch of our State is entitled to the greatest respect by our courts. The presumption that the legislative action is constitutional is a strong one and heavy burden is placed upon the challenger to rebut that presumption.

Consequently, the holding in *Austin* must and will be construed as narrowly as possible. There are differences between the situation and the statute which was involved in *Austin* and the situation and the statute presented to this Court.

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The simplistic approach of plaintiffs that *Austin* governs and need not be examined in depth is simply not justified. *Austin* is not identical to the situation here. Nothing in *Austin* indicates any reason for the enactment of the New Hampshirs statute other than to raise general revenue. The statute before this Court indicates the use of the revenues collected under the Act to the transportation fund. There is no indication of dedication in *Austin*. The purpose of the New Jersey Act is the alleviation of the commuter problem. Thus, a direct benefit is intended to inure to New York commuters such as Salorio. The *Austin* situation is silent on this issue.

Thus, the New Jersey Act was passed for a specific purpose while the New Hampshire Act was merely passed for general revenue purposes. One cannot assert discrimination in the lay sense of the word since the commuter is not harmed financially. To the contrary, these non-resident commuters do receive a direct benefit from the tax. Surely the New Jersey legislation, on its face, embodies a rational and equitable allocation of the burdens of state government. That is all that the privileges and immunities clause or the equal protection clause here require.

Article IV, Sec. 2 of the United States Constitution provides that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". This provision prohibits discrimination by a state, but only when there is no substantial reason for the discrimination other than citizenship or residence in another state. The inquiry in each case must be whether substantial reasons do exist and whether the degree of discrimination between residents and non-residents bears a close relation to the reasons.

The rule requiring substantial equality for residents of the taxing state and non-resident taxpayers dictates that

the tax must be sustained. The scheme is logical and fair. During part of the time involved here New Jersey residents paid this tax. During the period when they did not pay any income taxes at all, residents paid property taxes. The property taxes in this State are among the highest in the nation and the whole New Jersey tax structure relies heavily thereon. Non-resident commuters do not ordinarily pay property taxes and so have not contributed substantially to State revenues, yet they do partake of benefits offered to alleviate the transportation problem. Furthermore, non-residents enjoy other benefits, services and protections provided by the State of New Jersey. The Court finds that the transportation problem is substantial and the ultimate impact of the tax upon residents and non-residents bears a close relation to the challenge of correcting the traffic and commuting problems.

The equal protection clause does not require that all persons be treated equally under the law at all times. The essence of the constitutional guarantee is simply that whatever classifications are made be reasonable. Surely the classification bears a reasonable relation to a proper governmental purpose. No more than this is required. The State need not demonstrate a compelling state interest. In economic matters (including taxation) the test has remained whether the statute is rationally related to a proper governmental purpose. This Court has found a proper governmental purpose. Broad discretion is vested in the Legislature in matters of taxation. *Austin* v. *New Hampshire,* 420 U.S. at 662. While a somewhat more stringent test was applied in *Austin* in determining whether the statute violated the privileges and immunities clause (which has here been met), it is not at all clear that the Supreme Court would have employed a strict scrutiny analysis under the equal protection challenge had

the court in *Austin* squarely determined the equal protection question. This Court declines to do so.

In addition, and perhaps most importantly, are the attitude and actions of the two sovereign states involved in this litigation, directly or indirectly, who are and will be affected by the decision herein. In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters.[1] New York accepted the 1961 legislation and what developed later. It arranged for certain credits to be given residents of both New York and New Jersey. New York saw to it that its residents did not pay anything extra by virtue of their working in New Jersey. New Jersey took the same attitude.

But what if these distinctions did not exist between the situation here and the situation as it was before the court in *Austin*? The end result would be the same for there is no question in this Court's mind that the 1962 accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states. *Austin* did not contemplate such a compact. It boggles the mind to consider a situation where two states could not make adjustments between them and pass reciprocal-type legislation (which would allow either to pass tax laws) whereby the citizens of two states wer not financially effected. Surely this was not what *Austin* had in mind.

---

[1] This Court's finding that there was an "accord" between New York and New Jersey is not inconsistent with the recent holding of the Supreme Court in *United States Steel* v. *Multistate Tax Commission*, U.S. , 98 S.Ct. 799 (1978).

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As the United States Supreme Court was careful to state in a footnote in *Austin*:

> Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon non-residents, not reciprocally favorable treatment of non-residents by States that coordinate their tax laws. 420 U.S. 666, 1198 f. 12.

Even to date the New York Legislature has not sought to repeal the tax credit extended to its residents for taxes paid to New Jersey. To this date the New Jersey Legislature has adhered to New Jersey's essential obligations under the arrangement (starting in 1962) by continuing in effect the credit accorded its residents for taxes paid to New York. Neither governor has taken formal action to rescind the limited part of the accord not depedent on legislative action, nor have they even made a statement which would challenge the validity of the arrangement.

VI. Conclusion

The Act on its face is distinguishable from that before the Court in *Austin*. The specific purpose of the legislation is a valid one. The Act is constitutional. The question as to whether the Act is being unconstitutionally applied cannot be here determined. What can be said is that the Act contains the internal safeguards to protect the individual rights of New York commuters.

Judgment accordingly.

Very truly yours,

/s Sherwin D. Lasher
J.S.C.

SDL:joe

Appendix B

To be Attached to and Made a Part of Judge Lester's Letter Opinion Dated October 24, 1978.

[LETTERHEAD OMITTED]

October 31, 1978

David C. Jacobson, Esq.
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Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625
Attn: Herbert K. Glickman, Esq.

Adrian M. Foley, Jr., Esq.
McElroy, Connell, Foley & Geiser
Gateway 1
Newark, New Jersey 07102

Re: John Salorio, et al. v. Sidney Glaser, Director of the Division of Taxation, Dept. of the Treasury of the State of New Jersey.
Docket No. C-3628-76

Gentlemen:

The opinion letter of October 24, 1978 is hereby amended by inserting an asterisk (*) indicating a footnote after the word "statute" at the end of the last line of the first full paragraph on page 10 of the opinion and by adding a footnote as follows:

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• N.J.S.A. 54:8A-22. Misapplication of funds; right to refund, reads in pertinent part:

> In the event that any part of the moneys in the Transportation Fund shall, at any time, be applied to a purpose or purposes other than one set forth in this act, every taxpayer who shall thereupon have been subject to the tax imposed by this act and who shall have paid the same, shall be entitled to a refund, or to a credit against taxes subsequently accruing, equal to his pro rata share of the amount so applied • • •.

Furthermore, N.J.S.A. 54:8A-57 calls for a suspension of the tax imposed by the Act in the event that funds are used for an improper purpose. The suspension must continue until the amounts to be refunded, as determined under section 22, have been allowed and paid.

Thus, the internal safeguards protecting the constitutional rights of individual taxpayers in the *application* of the statute appear on the face thereof. The administrative remedies afforded plaintiffs stand intact, untested and surely not exhausted. (END OF FOOTNOTE)

Very truly yours,

s/ SHERWIN D. LESTER
J.S.C.

SDL:joc

Appendix B

To be Attached to and Made a Part of Judge Lester's Letter Opinion Dated October 24, 1978.

[LETTERHEAD OMITTED]

November 8, 1978

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Gateway 1
Newark, N. J. 07102

Re: Salorio v. Glaser
Docket No. C-3628-76

Gentlemen:

Reference is made to the letter opinion in this matter dated October 24, 1978.

The following errors were brought to my attention and corrections should be noted as follows:

1. At page 4 in the first full paragraph at line 6, the words "State Commissioner of *Taxation*"

should be changed to "State Commissioner of *Transportation.*"

2. At page 13 in the second full paragraph, the third full sentence should read: "During part of the time involved here New Jersey residents *were subject to* this tax." (emphasis indicates changes)

Very truly yours,

SHERWIN D. LESTER
J.S.C.

SDL:joc

APPENDIX C

Accord of May 6, 1962 Between the States of New York and New Jersey

JOINT STATEMENT OF
GOVERNOR RICHARD J. HUGHES OF NEW JERSEY
AND
GOVERNOR NELSON A. ROCKEFELLER OF
NEW YORK

Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York have announced that the Executive Departments of their respective States have reached an understanding in regard to the operation and administration of the income tax laws of the two States.

The Governors declared that it has been agreed that

(a) The State of New York:

1. Will extend full faith and credit to the New Jersey Emergency Transportation Tax Act, Chapter 38, P. L. 1961, as amended;

2. Will allow New York residents to receive a credit against taxes otherwise payable to the State of New York under the personal income tax law of New York for the amount of income tax payable to the State of New Jersey under its Emergency Transportation Tax Act upon income earned in the State of New Jersey;

3. Will not initiate, support or participate in, directly or indirectly, any legal action or proceeding to attack the validity of the New Jersey Emergency Transportation Tax Act or any amendments adopted by the State of New Jersey hereafter which

are designed to bring to New Jersey residents a credit against taxes otherwise payable to the State of New Jersey under the Emergency Transportation Tax Act for the amount of tax payable to the State of New York under the personal income tax law of New York upon income earned in the State of New York;

4. Will not contest the right of the State of New Jersey to levy and collect the tax imposed by the Emergency Transportation Tax Act upon residents of the State of New York who are subject to the provisions of such act; and

5. Will cooperate with the State of New Jersey in the application and administration of the tax laws of the two States so as to assure the citizens of both States affected the greatest degree of certainty as to their responsibility under the respective income tax laws of the two States.

(b) The State of New Jersey:

1. Will extend full faith and credit to the New York Personal Income Tax Law and the amendments thereto set forth in Chapter 2, P. L. 1962, of the New York Laws;

2. Will move to adopt legislation which will extend to residents of the State of New Jersey a credit against the tax otherwise payable to the State of New Jersey under the Emergency Transportation Tax Act for the amount of income tax payable to the State of New York upon income earned in the State of New York;

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3. Will not initiate, support or participate in, directly or indirectly, any legal action or proceeding to attack the validity of the personal income tax law of New York as amended by Chapter 2 of 1962, of the Laws of the State of New York insofar as such law has operated to require New Jersey residents subject to the personal income tax law of New York to pay to the State of New York the full amount of the tax due upon income earned in the State of New York during the tax year 1961 without regard to any liability for taxes upon such income such New Jersey resident may have to the State of New Jersey under the Emergency Transportation Tax Act;

4. Will not contest the right of the State of New York to levy and collect the tax imposed by the Personal Income Tax Law of New York upon residents of the State of New Jersey who are subject to the provisions of such act; and

5. Will cooperate with the State of New York in the application and administration of the tax laws of the two States so as to assure citizens of both States affected the greatest degree of certainty as to their responsibilities under the respective income tax laws of the two States.

The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.

Both Governors pledged continued cooperation between the States of New York and New Jersey, not only in re-

gard to the operation of the income tax laws, but in all other areas involving the mutual well-being of the two States.

Governor Hughes observed that the revenues that will be derived from the Emergency Transporation Tax Act will be devoted to the problems of the interstate commuters and expressed the hope that the availability of such revenues would expedite solutions to the problems affecting the trans-Hudson commuters. Governor Rockefeller joined with Governor Hughes in expressing his conviction that any solution to the trans-Hudson commutation problem must be approached on a bi-state basis.

Appendix C

[State Seal]

State of New York
EXECUTIVE CHAMBER
Albany

NELSON A. ROCKEFELLER
Governor

June 25, 1962

Dear Dick:

Enclosed are copies of the statement released here on May sixth concerning our joint agreement on the administration and enforcement of the personal income tax laws of our respective states, as requested in your letter of June fifteenth.

Sincerely,

NELSON

The Honorable Richard J. Hughes
Governor of New Jersey
State House
Trenton, New Jersey

Enclosures

Appendix C

FOR RELEASE IN THE PAPERS OF SUNDAY,
MAY 6, 1962

ROBERT L. MC MANUS, PRESS SECRETARY
TO THE GOVERNOR

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

JOINT STATEMENT OF
GOVERNOR RICHARD J. HUGHES OF NEW JERSEY
AND
GOVERNOR NELSON A. ROCKEFELLER
OF NEW YORK

Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective states as they affect residents of the other state.

Governor Rockefeller announced that New York, under legislation enacted at the 1962 Legislative Session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.

Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New

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Jersey Emergency Transportation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

In addition, it was agreed that neither state would contest, nor participate in contesting, the right of the other to levy and collect the taxes imposed by the two laws on residents of the other, and that each state would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.

The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two states and will insure certainty in the application and administration of such laws.

The Governors stated that they are taking this action in the interest of promoting interstate cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will.

No. 83-596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

—v.—

JOHN SALORIO, ROBERT COE and JOHN D. MCGARR, JR.,

Cross Respondents.

ON CROSS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR CROSS RESPONDENTS JOHN SALORIO, ROBERT COE AND JOHN D. McGARR, JR. IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI

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November 7, 1983

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IN THE

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No. 83-596

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

—v.—

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BRIEF FOR CROSS RESPONDENTS JOHN SALORIO, ROBERT COE AND JOHN D. McGARR, JR. IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI

Counterstatement of the Case

For the last three years, cross petitioner Glaser has defended the constitutionality of the New Jersey Commuter Income Tax under the Privileges and Immunities Clause on the grounds that the tax, levied exclusively on New Yorkers, was commensurate either with the costs assertedly imposed by New York residents on its transportation facilities, or with amorphous and unquantifiable "benefits" New Yorkers derived from these facilities. Now that these defenses have been decisively rejected by the New Jersey Supreme Court in light of *Austin* v. *New*

Hampshire, 420 U.S. 656 (1975), cross petitioner abandons them. Instead, the cross petitioner has in effect asked this Court to reconsider its 1980 denial of certiorari in this case. But the two arguments cross petitioner now seeks to revive are no more worthy of this Court's attention in 1983 than they were in 1980.

First, cross petitioner contends that cross respondents, individual New York commuters, are somehow estopped from bringing an action under the Privileges and Immunities Clause by an unsigned press release issued by the Governors of New York and New Jersey in 1962. While the cross petitioner has unilaterally dubbed the press release an "interstate compact," any interstate agreement affecting individual rights is subject to the same constitutional constraints as the Commuter Income Tax itself. New York and New Jersey cannot, consistent with the Privileges and Immunities Clause, agree to do what New Jersey cannot do unilaterally. In any event, there is no factual basis in this record for transmogrifying a press release into a solemn compact, especially when no reciprocal tax legislation arose out of the so-called agreement. And since the New Jersey Supreme Court has previously decided, as a matter of state law, that New York and its residents are not estopped from challenging the tax, *no* disposition by this Court of the questions presented by cross petitioner would change the ultimate result in this case. Certiorari should therefore be denied.

Alternatively, cross petitioner seeks certiorari on the theory that, even though the taxes paid by New Yorkers under the Commuter Income Tax are grotesquely disproportionate to any costs they might impose on New Jersey's transportation system, nevertheless the tax should be sustained because New Yorkers pay, on the average, lower overall taxes to New Jersey than do New Jersey residents. This theory was, however, expressly rejected in *Austin*, and cross petitioner proposes no reason why this Court should consider that issue anew.

A. The "Accord" Between New York and New Jersey is a Fiction.

The cross petition for certiorari is predicated chiefly on the existence of an alleged executive accord or agreement between the Governors of New York and New Jersey to respect one another's taxing schemes. The background facts—or, more precisely, the absence of facts—make clear why the cross petition does not present issues worthy of this Court's review.

There is *no* document in this record—or anywhere else—even purporting to be an agreement or compact between the States of New York and New Jersey. The purported "agreement" relied upon by cross petitioner is nothing but a press release issued by then-Governors Hughes and Rockefeller (Appendix C to Cross Petition at 66a-67a), which *refers* to an "understanding," but does not purport to be an "agreement."[1] No conjuring can elevate this unsigned statement into a formal agreement between two sovereign states, binding on citizens of New York twenty years later.

Second, no reciprocal tax legislation was enacted by New York and New Jersey pursuant to any "agreement." Cross petitioner has simply christened the separate and independent tax statutes of each state "reciprocal". Indeed, the Commuter Income Tax at issue here could not possibly have been enacted pursuant to the "agreement," since it was enacted on May 19, 1961—a full year before the press release was issued.

When New York and New Jersey wish to enter into a binding agreement, they know how to do so. The record below contains a formal contract concerning income tax withholding procedures, replete with "whereas" clauses setting forth the

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1 Cross petitioner has also included in its Appendix a "Joint Statement" (61a-64a). But in proceedings below, it was conceded that this unsigned document had been found in an old file. There was no evidence as to whether it was a draft; whether it had ever been reviewed, let alone approved, by New York; or whether it had been released.

reasons for the agreement, paragraphs explicitly delineating the terms of the agreement, and signatures of representatives of New York and New Jersey.

In any event, even if there were any basis for concluding that an "accord" was entered in 1962, New York, by its subsequent conduct, unequivocally withdrew from it. Thus, in 1976, after this Court's *Austin* decision, New York instituted litigation challenging the validity of New Jersey's Commuter Income Tax. *New York* v. *New Jersey*, 429 U.S. 810 (1976). Moreover, the fact, trumpeted by respondent, that New York has defrayed the legal expenses entailed by the present litigation only underlines the fact that it does not consent to the discriminatory taxing of its citizens by New Jersey. Surely, if New York can be said to have entered an accord merely by issuing a press release, no greater formalities need be observed in rescinding it.

Finally, the origins and history of respondent's "accord" theory make it all the more clear that this argument is a makeweight. Thus, when cross petitioner opposed New York's motion for leave to file a bill of complaint within the original jurisdiction of this Court in 1976, it never raised the point—rather obvious, if true—that New York had consented to the tax it was challenging. Indeed, the contention that the press release was sufficient to estop cross respondents from challenging the constitutional defects of the Commuter Income Tax was not raised during the lengthy proceedings in the trial court, or included in the voluminous evidence submitted, until it was urged in a *reply* brief in 1978—many months after the litigation had commenced.

B. There is No New Jersey Tax That Falls Exclusively on Residents of New Jersey.

As an alternative ground for seeking certiorari, cross petitioner concedes that the Commuter Income Tax cannot be justified with reference to any peculiar costs or burdens that New York residents impose on New Jersey's transportation facilities, but urges that the magnitude of the levies under the

tax are reasonable in light of the substantial *overall* tax burden borne by New Jersey residents. While, as we demonstrate below, this contention is foreclosed by *Austin*, even on its own terms cross petitioner's argument is predicated on a series of factual mistatements and misleading assumptions.

Cross petitioner's brief states that "New Jersey residents pay substantial other state taxes *which nonresidents do not pay*" (emphasis added). This statement is flatly false. There is not a single tax levied by the State of New Jersey that is applicable *only* to New Jersey residents. The record below demonstrates, for example, that New York commuters pay, at a minimum, $2.6 million per year to New Jersey in motor fuel taxes alone, and that this sum *more* than makes up for any costs New Yorkers impose on New Jersey's transportation facilities. Similarly, at the local level, every nonresident who owns property in New Jersey pays the same property taxes, to support the same government services, that his neighbor who is a New Jersey resident pays.

Thus, the Commuter Income Tax challenged here is not offset by any tax imposed exclusively on New Jersey residents. And, ironically, as the New Jersey Supreme Court found, funds obtained from New Yorkers under the Commuter Income Tax are often used to defray the costs of *intrastate* buses and rail service, which New Yorkers rarely use.[2] What cross petitioner is really complaining of, then, is that New Jersey residents pay more tax dollars to New Jersey than nonresidents do. But it hardly follows from this unsurprising fact that New Jersey residents "pay more than their fair share of the costs of [New Jersey] government." Nor does it justify the discriminatory tax at issue here.

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2 New Yorkers make up less than 3% of the ridership of New Jersey's commuter railroads, and yet Commuter Income Tax receipts were used to provide 75% of the subsidies for this service—resulting in New Yorkers' paying more than 25 times their fair share. Similarly, Commuter Income Tax receipts provide 20% of the subsidies for intrastate buses, even though New Yorkers comprise only 2.6% of bus passengers. *Salorio* v. *Glaser*, 414 A.2d 943, 954 & n. 22 (N.J. S. Ct.), *cert. denied*, 449 U.S. 874 (1980).

SUMMARY OF ARGUMENT

The "Questions Presented" by the cross petitioner presuppose that an agreement was entered into by the States of New York and New Jersey. But the record shows that there is no such agreement. Thus, the "Questions Presented" by the cross petitioner are hypothetical constitutional questions that this Court need not decide.

The "Questions Presented" are also wholly irrelevant to whether the Commuter Income Tax is unconstitutional, since any agreement of whatever form between states is itself subject to the Privileges and Immunities Clause. No agreement can affect taxpayers' individual right under the Privileges and Immunities Clause to be free from discriminatory taxation.

The New Jersey Supreme Court concluded, as a matter of statutory construction, that New York had not bound itself to any agreement, and that its citizens were therefore not estopped from challenging the tax. This conclusion rests on an independent and adequate state law ground, which this Court has always held it has no jurisdiction to review.

The alleged agreement would not, in any event, be legally enforceable even if it did exist. The "agreement" does not comply with the requirements of the Compact Clause even though the agreement, as cross petitioner describes it, would grant one state the right to impinge on another state's power to regulate the tax liabilities of its own citizens, in a fashion repugnant to the Privileges and Immunities Clause.

The contention that the Court below erred in failing to compare Commuter Income Tax revenues with *all* state taxes paid by both residents and nonresidents alike is foreclosed by *Austin* v. *New Hampshire*.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

CROSS PETITIONER'S CLAIM BASED UPON AN "AGREEMENT" BETWEEN NEW YORK AND NEW JERSEY IS NOT WORTHY OF REVIEW.

Cross petitioner's claim based on a purported agreement between New York and New Jersey raises no issue worthy of review by this Court for the following reasons:

A. The Facts of Record Do Not Permit the Formulation of the "Questions Presented" By the Cross Petitioner.

The facts of record show conclusively that there was *no* agreement between New York and New Jersey. Although the press release mentions an "understanding" between the Governors of New York and New Jersey, it is obvious from the face of the press release that it is not itself an agreement. There is not even a family resemblance between the casual document on which cross petitioner relies and the formal interstate agreement, signed by representatives of both states, in the record below.

There was *no* resolution by the New Jersey Supreme Court in 1980 of this threshold factual question. The Court specifically noted that "[t]he parties disagree over the existence and legal effect to be given the *alleged* 'accord' . . . " (emphasis supplied), but chose not to reach the issue; it did not affirm the finding of the lower court, nor did it remand this question to the trial court. 414 A.2d at 956. At best, then, there remains a purely factual dispute between the parties concerning the very existence of the putative accord.

Before reaching the merits of the constitutional claim presented in the cross petition, then, this Court would be required to resolve this question of fact. Yet this Court does not grant certiorari to review factual determinations, especially when the evidence has not been reviewed by the appellate courts. *See,*

e.g., *General Pictures Co.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938) ("Granting the writ would not be warranted merely to review the evidence. . . "); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a [writ of] certiorari to review evidence and discuss specific facts").

In the absence of assurance from the record below that an agreement between New York and New Jersey exists at all, the "Questions Presented" in the cross petition are nothing more than hypothetical. Accordingly, this Court should not grant certiorari. *See*, *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it' "); *Hagans* v. *Lavine*, 415 U.S. 528, 547 (1974) ("a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available").

Moreover, this Court cannot address the constitutional claim without determining the legal effect of any purported agreement—a question of state, *not* federal, law over which the Court has repeatedly held it has no jurisdiction. *See*, *e.g.*, *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).[3]

B. Any "Accord" Must Itself Pass Muster Under the Privileges and Immunities Clause.

This Court explicitly stated in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978), that any agreement of whatever form between states is *itself* subject to the limitations of the Privileges and Immunities Clause. *Id.* at

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3 As cross petitioner concedes, Congress has never approved the supposed "agreement"; therefore, the legal effect and meaning of the bilateral accord are purely questions of state law. *See Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981) ("Because congressional consent *transforms* an interstate compact . . . into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question. . . .") (emphasis supplied).

478 (citing *Austin*). Cross petitioner fails to recognize this basic point: what one state cannot do alone by means of legislation, two states cannot do together by "agreement." An agreement which, on cross petitioner's terms, would require New York to "respect and enforce" New Jersey's tax statute is invalid unless the statute the agreement is designed to enforce is, standing alone, constitutional. As the New Jersey Supreme Court rightly determined in its 1980 opinion, the Commuter Income Tax "must independently pass muster under the Privileges and Immunities Clause," 414 A.2d at 957-58. Thus, nothing in this controversy can possibly depend on whether cross petitioner's argument concerning the "accord" is right or wrong.

No "agreement" between New York and New Jersey may preclude taxpayers from asserting their individual rights under the Privileges and Immunities Clause. As this Court said in *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60, 82 (1920):

> "A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States."

The Court in *Austin* quoted this language, terming it "fully applicable" in that case. 420 U.S. at 667. To be sure, agreements between states providing "reciprocally *favorable* treatment of nonresidents" may be constitutional. *Id.* at 667 n. 12 (emphasis supplied). But an agreement to enforce a New Jersey statute like the Commuter Income Tax, which does not grant treatment to New York residents that is at least as favorable as that granted to New Jersey residents, is impermissible. Thus, the short answer to cross petitioner's circular argument that the legislation at issue here is "favorable" or, at worst, "neutral," is that the New Jersey legislation is identical with the legislation struck down in *Austin* as not being "reciprocally favorable."

C. The Questions Presented By the Cross Petition Raise Issues of State, Not Federal, Law.

In its 1980 opinion, the New Jersey Supreme Court interpreted the Commuter Income Tax and the New York taxing statute to determine whether, pursuant to these state statutes, New York State had agreed to bind itself or its citizens to accept the Commuter Income Tax. The Court concluded that, even assuming that New York could constitutionally "restrict its prerogative for fashioning tax policy by agreement with New Jersey, *it is clear that New York has not done so here*." *Salorio*, *supra*, 414 A.2d at 956 (emphasis supplied). As a matter of statutory interpretation, then, "the present interaction of the ETT with New York's personal income tax law is susceptible to change at any time by the legislature of either state. . . ." *Id.* at 957. In short, the New Jersey Supreme Court rejected cross petitioner's contention that the statutes, or any alleged accord, estop cross respondents' challenge to the Commuter Income Tax.

Since the interpretation of any interstate agreement not approved by Congress is a matter of state law only, *Cuyler*, *supra*, 449 U.S. at 438-39 & n.7, the questions presented in the cross petition raise no issue of federal law. In such circumstances, this Court has always concluded that it lacks jurisdiction. *Murdock*, *supra*, 87 U.S. (20 Wall.) at 632-33. Even if the New Jersey Supreme Court's opinion also touched on constitutional issues, this Court still lacks jurisdiction, since the lower court's opinion rests on an adequate and independent state law ground. Any review of the federal issue would not change the result below. *See*, *e.g.*, *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945) ("our power is to reverse wrong judgments, not to revise opinions").[4]

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4 At best, cross petitioner could argue that it is unclear whether the New Jersey Court was relying on state or federal law in addressing the press release issue. Where, as here, the cross petitioner has not sustained his burden of establishing clearly the jurisdiction of this

D. The New Jersey Supreme Court's Decision is Fully Consistent with *Multistate Tax Commission.*

The New Jersey Supreme Court's alternative conclusion that, even if New York had bound itself to the alleged agreement, it was not legally enforceable, is fully consistent with this Court's decision in *Multistate Tax Commission*, *supra*, 434 U.S. 452, and presents no issue worthy of review.

An agreement by New York purporting to give New Jersey the right to "enforce" and thereby perpetuate the tax credit currently extended to New York residents would be a relinquishment of New York's sovereign power to regulate the tax liabilities of its own citizens and to rescind its own legislation. Such a tax credit, the New Jersey Supreme Court found, is "a matter of legislative grace," control of which New York cannot concede to New Jersey without congressional approval. *Salorio*, *supra*, 414 A.2d at 957. Especially where, as here, the effect of the alleged "accord" would be to permit New Jersey to impose a special tax burden exclusively on persons politically unrepresented in the state, "the structural balance essential to the concept of federalism" is directly and inescapably at stake. *Austin*, *supra*, 420 U.S. at 662.[5]

As the New Jersey Supreme Court rightly reasoned, such relinquishment of sovereign power by one state to another state encroaches on these same principles of federalism. *Salorio*, *supra*, 414 A.2d at 957. Under established rule, affirmed in *Multistate Tax Commission*, any agreement threatening or

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Court, the Court has ruled that it is without jurisdiction to decide the questions presented. *See*, *e.g.*, *Durley* v. *Mayo*, 351 U.S. 277, 281, 285 (1956); *Stembridge* v. *Georgia*, 343 U.S. 541, 547-48 (1952); *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 651 (1942).

5 *See* J. Ely, *Democracy and Distrust* 83 (1980) (". . . the reason inequalities against nonresidents and not others were singled out for prohibition in the original document is obvious: nonresidents are a paradigmatically powerless class politically.")

altering the federal structure in this manner must comply with the strictures of the Compact Clause.[6]

Instructively, the purported agreement at issue here is exactly the opposite of the reciprocal agreement in *Bode* v. *Barrett*, 344 U.S. 583 (1953), cited by cross petitioner. In *Bode*, Illinois agreed to tax only its *own* citizens, and to provide exemptions for non-citizens, if other states reciprocated. *Id.* at 586. Obviously, such an arrangement contemplates that each state *retains* control over the taxation of its own citizens, thereby precluding abusive discrimination and avoiding the dangers of retaliatory tax legislation among states.

Congress never approved any purported accord between New York and New Jersey concerning the Commuter Income Tax. The New Jersey Supreme Court, concluding in the alternative that such an unratified accord would violate the Compact Clause, thus correctly applied settled principles in this case. No issue worthy of review by this Court is presented.[7]

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6 Cross petitioner, having created an "agreement" out of whole cloth by ascribing solemn characteristics to a press release, then proceeded to attribute powers to this "agreement" that far surpass even the powers actually granted by the states in the agreement scrutinized in *Multistate Tax Commission*.

Unlike the situation posited by the "agreement" alleged here, no state that was a party to the Multistate Tax Compact relinquished any of its sovereign power. The Commission created by the state had the power to adopt only advisory regulations that would have "no force in any member State until adopted by that State in accordance with its own law." 434 U.S. at 457. Individual states retained "*complete control over all legislation and administrative action*" affecting tax liabilities. *Id.* (emphasis supplied).

7 Because the cross petition for certiorari was not filed until October 6, 1983, more than 90 days from the entry of the judgment below, in any event the cross petition cannot be granted unless cross respondent's timely petition for certiorari is granted as well. *See* Supreme Court Rule 20.5.

POINT II

CROSS PETITIONER'S ARGUMENT THAT THE COMMUTER INCOME TAX SHOULD BE UPHELD BECAUSE NEW JERSEYANS PAY MORE DOLLARS IN TAXES TO NEW JERSEY THAN DO NEW YORKERS IS FRIVOLOUS, AND NOT WORTHY OF REVIEW.

Cross petitioner's fall-back defense of the constitutionality of the Commuter Income Tax is not based on a showing that New York commuters are a "peculiar source" of any transportation problem, or that the tax is a carefully tailored response to that problem. Indeed, after years of litigation, a full trial on the merits, and careful review by the highest court of New Jersey, the cross petitioner, in this Court, abandons *any* attempt to justify the size of the levies under the tax in relation to the costs New York commuters actually impose on transportation facilities. Instead, he points to the unstartling fact that residents of New Jersey pay higher *overall* taxes to their home state than nonresidents do, and asks this Court to conclude, without further ado, that New Jersey residents therefore pay "more than their fair share" of the costs of New Jersey government. This argument is plainly frivolous.

First, despite suggestions to the contrary in the cross petition, New Jersey levies *no* taxes on residents only. As we demonstrated above, New Yorkers who own property in New Jersey pay New Jersey real estate taxes, New Yorkers who buy products in New Jersey pay New Jersey sales taxes, and so on. Of course, many more New Jersey residents own property in the state than do New York commuters, so it is only natural that New Jerseyans, on the average, pay higher overall New Jersey taxes than do the commuters. But in constitutional terms, this is a meaningless comparison.[8]

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8 Cross petitioner's theory would justify a statute that imposed gasoline taxes and highway tolls exclusively on nonresidents, even if all other taxes were equally applicable to everyone. Moreover, the vast

From this Court's earliest consideration of the Privileges and Immunities Clause, it has recognized that the only relevant comparison is between taxes paid by residents alone and taxes paid exclusively by nonresidents. Thus, in *Austin*, *supra*, 420 U.S. 656, the Court struck down a New Hampshire tax that fell "exclusively on the income of non-residents" and that was "not offset even approximately by other taxes imposed upon residents alone." *Id.* at 665. For purposes of deciding whether the New Hampshire tax discriminated against nonresidents, this Court held that business, property and real estate transfer taxes levied on residents and nonresidents alike were simply not germane to the inquiry. *Id.* at 659 n.3, 665.

Similarly, in *Travellers' Ins. Co.* v. *Connecticut*, 185 U.S. 364 (1902), cited by cross petitioner, the Court upheld a tax statute that—superficially—discriminated against nonresidents. The Court compared the tax to the local property taxes levied *exclusively* on residents, which were at least equally substantial. *Id.* at 368. The Court concluded that the contribution by non-residents to state and local property tax revenues "was no more than the ratable share of their property within the state." *Austin*, *supra*, 420 U.S. at 664.[9]

The logic of comparing taxes imposed on nonresidents with those imposed exclusively on residents is readily apparent. A

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preponderance of the tax revenues raised by New Jersey—all of which "count" for purposes of the comparison cross petitioner draws—are used to defray the costs of activities that benefit New Jersey residents only; local schools are a good example.

9 The other cases cited by cross petitioner directly contradict his position. In each case, the Court compared the taxes paid by nonresidents to other taxes levied exclusively on residents, to determine if any discrimination existed. *See General American Tank Car Corp.* v. *Day*, 270 U.S. 367 (1926); *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1932); *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245 (1928). Thus, for example, in *Day*, the Court found that nonresidents were *exempt* from all local taxes, and that the challenged tax was "in lieu of" such taxes. 270 U.S. at 371-72. In any event, each of the three cases was decided under the Equal Protection and Commerce Clauses; no Privileges and Immunities Clause argument was raised.

state may be legitimately concerned that nonresidents who avail themselves of the benefits of state resources should not obtain a "free ride." A tax on nonresidents may therefore, in some circumstances, create *equality* between residents and nonresidents. But where, as here, New Yorkers pay every single tax paid by New Jersey residents, and in fact more often than not see their tax payments used to benefit New Jersey residents alone, there is no free ride.

Equally and independently significant, cross petitioner's argument simply ignores this Court's decisions in *Austin*[10], *Toomer* v. *Witsell*, 334 U.S. 385 (1948), and *Hicklin* v. *Orbeck*, 437 U.S. 518, 526-27 (1978). If these cases mean anything, they stand for the proposition that to justify discrimination based on the fact of state citizenship, a state must show, first, that the nonresidents are the "peculiar source" of the alleged problem, and, second, that there is a "substantial relationship" between the burden imposed by nonresidents and the discrimination practised against them. In this Court, cross petitioner does not even contend that the Commuter Income Tax meets either branch of this test. Since the cross petitioner has presented the Court with no reasons why *Austin*, *Toomer* and *Orbeck* should be overruled, certiorari should be denied.

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10 Indeed, cross petitioner's position is rather schizophrenic, since its cross petition is entirely inconsistent with the argument contained in its brief in opposition to cross respondents' petition for certiorari. There, it contended that *Austin* compels "a calculation of whether the tax bears a substantial relationship to the evils which the tax has been enacted to correct" (p. 2)—a rather more relaxed standard than that imposed by this Court, but nevertheless one clearly not met here.

CONCLUSION

For the foregoing reasons, the cross petition for a writ of certiorari should not be granted.

Respectfully submitted,

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November 7, 1983

No. 83-596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

v.

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Cross Respondents.

On Cross Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF IN SUPPORT OF CROSS PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

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REPLY BRIEF IN SUPPORT OF CROSS PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

If The Court Grants The Petition For Certiorari In *Salorio* v. *Glaser* (Docket No. 83-353), It Should Also Grant The Cross Petition In Order To Review The Entire Case

Cross respondents' brief in opposition to the cross petition for certiorari proceeds on the premise that this case is identical to *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). This premise is mistaken.* The circumstances attending the New Jersey emergency transportation tax ("ETT") are fundamentally different from those underlying the New Hampshire tax considered in *Austin.* First, the ETT is imposed in accordance with bilateral agreement entered into by the Governors of New York and New Jersey, which cross petitioners contend is an express exception to the *Austin* rule (*see* 420 U.S. at 667, n. 12). Second, the explicit purpose of the ETT is to relieve the transportation crisis existing in the New York-New Jersey metropolitan area; all revenues collected under the ETT are statutorily dedicated to financing New Jersey's transportation facilities, which provide a direct and substantial benefit to New York commuters. This is in sharp contrast to the situation presented in *Austin* where there was no such bistate agreement or state object, other than the raising of general revenue.

Cross respondents' attempts to obscure these crucial distinctions are unavailing. Thus, their attempt to deny the existence of a bistate agreement blithely ignores writings between the two states recognizing its existence (see Cr. Pet. App. C) and the undisputed public acknowledgment

* It is noteworthy that cross respondents advanced this same argument as justification for a prior appeal to this Court from an earlier decision of the New Jersey Supreme Court. This Court dismissed the appeal. *Salorio* v. *Glaser,* 449 U.S. 804 (1980).

of same by the Governors of New Jersey and New York. Cross respondents have never questioned the existence or authenticity of these materials. Moreover, it is clear that interstate agreements may take many forms—written, oral, or simply reciprocal legislation with no independent writings at all. *See United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 467-70 (1978). Finally, cross respondents' allegation that there was no agreement overlooks the fact that the only court to have ruled on the question (namely the trial court in the initial trial court proceeding) found that the agreement exists (Cr. Pet. at 8-9, 15).*

In an effort to avoid this Court's review of the entire case, cross respondents assert that the New Jersey Supreme Court concluded in its 1980 opinion that as a matter of state law the 1962 agreement was unenforceable, and suggest that this Court should decline to review questions of state law. This is a blatant distortion of the New Jersey Supreme Court's decision. Contrary to cross respondents' statement, it is entirely clear that the Supreme Court of New Jersey in its initial opinion did not rule on the enforceability of the 1962 Accord under state law, but

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* If cross respondents are suggesting that a state court finding is to no effect unless approved by the highest court of the state, they are plainly wrong. A factual or state law legal conclusion passed upon by a lower state court and not reviewed by a state supreme court is generally accepted by this Court on review. *See Sears Roebuck & Co.* v. *San Diego County District Council of Carpenters,* 436 U.S. 180, 185 n. 8 (1978); *Evco* v. *Jones,* 409 U.S. 91 (1972). Indeed, this Court has held that where a state court fails to make findings of fact because it views certain evidence in the record as immaterial, there is no bar to this Court itself reviewing the evidence. *See Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 703 (1945); *Merchants National Bank* v. *Richmond,* 256 U.S. 635, 638 (1921).

rather assumed its enforceability and went on to hold that the agreement was invalid under the Compact Clause (Cr. Pet. App. A at 28a and 30a).* Since the Supreme Court of New Jersey did not rule on the enforceability of the 1962 agreement, there is simply no factual predicate for cross respondents' argument that the decision below rested on an adequate and independent state ground. Rather, the court bottomed its conclusion respecting the Accord squarely on its erroneous interpretation of the federal Constitution. Thus, the New Jersey Supreme Court stated in its 1983 opinion that in its initial opinion it had "questioned the validity of the Accord *under the Compact Clause* . . ." (Pet. App. A at 19) (emphasis supplied). Where the decision of a state court does not address a possible state law issue but instead directly raises a federal question, the Court will not refuse to accept jurisdiction on the basis of an adequate and independent state ground. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 634-5 (1875); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935).**

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* The only state court to address the issue of the enforceability of the Accord apart from the Compact Clause was the trial court, which held that there was a binding agreement between New York and New Jersey. Under cross respondents' theory—that this is exclusively a state law question (citing *Cuyler* v. *Adams*, 449 U.S. 433 (1981))—this trial court determination would be conclusive, and review of cross respondents' assertions to the contrary would be foreclosed from consideration by this Court. *See Sears Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 185 n. 8 (1978).

** In any event, if it were *unclear* (which it is not) whether the Supreme Court of New Jersey based its judgment on an adequate and independent state ground, the Court, contrary to cross respondents' suggestion, should not dismiss the cross petition for lack of jurisdiction, but rather should stay a ruling on the cross petition pending clarification from the state court. *Herb* v. *Pitcairn*, 324 U.S. 117, 128 (1945).

In arguing that the 1962 Accord does not pass muster under the Privileges and Immunities Clause, cross respondents fail to appreciate that this Court in *Austin* sanctioned reciprocal actions by States which coordinate their tax laws. 420 U.S. at 667, n. 12. That is precisely what New York and New Jersey attempted to do in their 1962 agreement and the correlative amendments of their respective tax laws. If the Privileges and Immunities Clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism" (420 U.S. at 662), surely an agreement between two States to equitably apportion tax revenues from interstate commuters which results in no economic harm to any individual taxpayer* is not only sanctioned by the Privileges and Immunities Clause but indeed advances the essential purpose of the Clause.

In arguing that the 1962 Accord violates the Compact Clause in causing New York to relinquish its sovereign power to tax its own citizens, cross respondents, like the Supreme Court of New Jersey, misconstrue the effect of the Accord on this litigation. The enforceability of the Accord is not an issue in this case since New Jersey does not seek to enforce the agreement against New York—New York still allows credits in accordance with the agreement. Rather, the question in this case is whether the agreement is binding on individual taxpayers so long as it remains in effect. In the face of an existing agreement between two States determining how revenues from interstate commuters shall be apportioned, can individual taxpayers challenge that arrangement under the Privileges and Immunities Clause when they suffer

* See Cr. Pet. at 12 n. 18-19, 21 n.

no economic harm whatever under the arrangement? No case decided by this Court resolves that question.

As noted, the second fundamental difference between this case and *Austin* lies in the fact that, as fully documented in the record below, the revenues from the ETT are dedicated to funding New Jersey's transportation facilities which are overburdened in large part by the commuting class, of which New York commuters constitute a significant part. There was no such justification for the New Hampshire commuter tax. The tax revenues from Maine and Vermont residents were simply placed in New Hampshire's general fund and used for general state purposes. The ETT dedication is reflected in the Act itself which requires that ETT revenues be used exclusively to finance the New Jersey highway, bus, and railroad systems. Moreover, there is no question that the State expends substantial amounts for the benefit of New York commuters. Thus, in the remand proceeding before the State trial court, the State's expert witnesses produced extensive evidence of actual State expenditures allocable to the New York commuting class for highway, bus, and rail facilities. On the basis of such evidence, both the trial court and the Supreme Court of New Jersey concluded that New York commuters are a "peculiar source" of the transportation problem in New Jersey (Pet. App. B at 53a to 54a; Pet. App. A at 12a) and impose substantial burdens on New Jersey's transportation network. While the Supreme Court of New Jersey found that net ETT receipts were not substantially proportionate to transportation costs allocable to New York commuters, it did not question New Jersey's good faith reliance on the severe transportation problem and the use of ETT revenues to relieve that problem as a justification for the imposition of the ETT. The

court simply found, as a factual matter, that the revenues collected under the ETT were constitutionally disproportionate to the State's expenditures for transportation facilities allocable to the New York commuters (Pet. App. A at 15a). In so concluding the court failed to realize that the Accord compels a different result.

In short, there is simply no basis for equating this case with *Austin*, both because of the 1962 Accord between New York and New Jersey and because of the tailoring of the ETT to meet a problem created in significant part by nonresident commuters. Thus, if the Court were to grant the petition for certiorari, it is imperative that it also grant the cross petition in order to review the effect of the Accord and the payment by New Jersey residents of substantial other taxes on the validity of the ETT under the Privileges and Immunities Clause.

CONCLUSION

For the foregoing reasons, the cross petition for a writ of certiorari should be granted.

Respectfully submitted,

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